Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

D. BARRY SUTTON,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.;
BELLSOUTH TELECOMMUNICATIONS, INC.
COMPETITIVE MANAGEMENT RESTAFFING PLAN, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sutton was selected for termination by BellSouth under the express terms of an ERISA welfare benefit plan. After exhausting his remedies under the plan, Sutton filed suit under Section 502(a)(3)(B) of ERISA against BellSouth, the designated Plan administrator, and certain individual BellSouth employees specifically designated as "fiduciaries" by the Plan. In his suit, Sutton sought appropriate equitable relief for defendants having caused his termination by their failure to comply with express terms of the Plan and with policies connected with the administration of the Plan, and by their failure to act "solely in the interest of the [Plan's] participants".

The lower courts held Sutton's suit was not authorized under ERISA.

The question presented is:

Whether the Eleventh Circuit's decision in this case rejecting Sutton's right to sue conflicts with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

PARTIES

The names of the Parties in the current caption of the case are correct. In addition, the following individual parties are named defendants whose names were omitted from the caption so that it would be consistent with the caption in the Eleventh Circuit: Rebecca Dunn, Charles B. Coe, Phillip Jacobs, Julia "Judi" North, Jane Killian and R. C. McGlaughlin.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT 2

A. Facts and Claims 2

B. Proceedings Below 7

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Varity Corp. v. Howe, 516 U.S. 489 (1996) ..... i, 8, 9, 10

STATUTES

ERISA § 502, 29 U.S.C. § 1132 (1988 ed.) 2

ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) 7

ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A) 7

ERISA § 502(a)(3)(B)(i), 29 U.S.C. § 1132(a)(3)(B)(I) 7

PETITION FOR A WRIT OF CERTIORARI

Sutton respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled proceeding on September 22, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Sutton v. BellSouth Telecommunications, Inc., et al.*, 189 F.3d 1318 (11th Cir. 1999), and is printed in the Appendix, *infra* at 1. The order on the merits by the United States District Court for the Northern District of Georgia, No. 1:96-CV-1842 – HTW (September 30, 1998), is printed in the Appendix, *infra* at 7.

JURISDICTION

The court of appeals entered its opinion and judgment on September 22, 1999 (App., *infra*, 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Sec. 502. (a) A civil action may be brought

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other

appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or terms of the plan. ERISA § 502, 29 U.S.C. § 1132 (1988 ed.).

STATEMENT

A. Facts and Claims

At the time his employment was terminated under the express terms of an ERISA plan, Sutton was a senior management official of BellSouth with over 20 years of service, and with an excellent record in progressively more responsible management positions. Sutton had most recently headed a project which had developed the strategy approved by BellSouth for its competition in the entrepreneurial Small Business market.

In early 1995, BellSouth management promulgated the Competitive Management Restaffing Plan ("CMRP" or "Plan"), which BellSouth expressly classified as "a welfare benefit plan under provisions of [ERISA]"(App., *infra,* at 90). The Plan's announced purpose was to provide severance benefits "to eligible management employees who are terminating employment with [BellSouth] . . . so that [BellSouth] **can hire individuals** who possess critical skills that [BellSouth] requires in order to compete in the telecommunications industry." (App., *infra,* at 80) [emphasis added].

Although BellSouth might have chosen to discharge some of its management employees to make room for outside employees possessing "critical skills", it attempted to avoid the undesirable morale fallout to its

senior management workforce by creating the openings using the Plan.

The words of the Plan did not merely provide for benefits to employees marked for termination, but expressly and explicitly provided for the procedures to be followed in *selecting* those employees for termination as follows:

- At the request of the **departmental officer** within whose organization the deficit in competitive skills exists, **the decision to utilize [the Plan] shall be approved by the [BellSouth] Vice President responsible for Human Resources [Respondent Rebecca Dunn].** Thereafter, the implementation and administration of the Plan are subject to the discretion of [Dunn] exercised in a manner consistent with the terms of the Plan. This includes determining for what periods of time the Plan will be in effect, **approving and overseeing the implementation of the Plan, and authorizing all separations and payments under the Plan.** (App., *infra*, at 81) [emphasis added].

- [Plan] universes will be approved within organizations that have been identified as having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive market intelligence. . . . (App., *infra*, at 84) [emphasis added].

- Using an evaluation procedure selected by [BellSouth], the overall effectiveness of each manager in the group will be rated and ranked, from highest to lowest. The lowest

> ranked managers will be offered separation under the provisions of the plan. **The number of [Plan] offers made will equal the number of vacancies that must be created so that the organization can hire individuals with the needed skills and expertise. Managers offered but declining separation under the provisions of the Plan will be terminated without benefits under the Plan.** (App., *infra,* at 85) [emphasis added].

An employee so selected would be terminated under the above Plan language, *either with or without benefits.* An employee who wished to be terminated *with benefits* was by express terms of the Plan required to:

- . . . irrevocably elect to and terminate employment with [BellSouth] on or before the date specified by [BellSouth] in the particular [Plan] offer (App., *infra,* at 82).
- . . . execute a [Plan] Election and Release form that will be provided to you by [BellSouth] (App., *infra,* at 82).

The Release was specifically "incorporated as part of the Plan" (App., *infra,* at 89, 101-102).

The express terms of the Plan also specified who had fiduciary responsibility in its administration:

> [BellSouth] is the [Plan] Sponsor and Administrator. [BellSouth] has delegated Plan administrative responsibilities as follows:
>
> - [BellSouth] has delegated to its Vice President responsible for Human Resources [Respondent Rebecca Dunn] the overall fiduciary responsibility for administering [the Plan] on behalf of [BellSouth] . . . and for

> making determinations, consistent with the terms of the Plan, concerning **when and to which individuals or groups [the Plan] will be offered** (App., *infra*, at 90).

Dunn, in her capacity of "administering the Plan" explained the Plan to senior BellSouth management employees in a May 1995 memorandum as follows:

a. The Plan "provides for *involuntary separation* of a predetermined number of managers in a defined group, where the group has been identified as having a deficit in understanding of technology, market segment expertise, or competitive market intelligence";

b. Under the Plan,

   (1) "[C]reated vacancies *must* be backfilled with *external hires*,"

   (2) "[C]reated vacancies may *not* be used for lateral or promotional movement," and

   (3) "*[I]ncumbents* in the defined groups *will be rated utilizing the Management Panel Evaluation Process* ["Panel Process"]." (App., *infra*, at 10) [emphasis added].

Dunn, in her capacity of "administering the plan" also represented orally and in writing to Sutton and other BellSouth senior management that the Panel Process would be fairly administered according to its terms and that the panel evaluators would have had supervisory experience with those rated within three years from the date of evaluation (App., *infra*, at 98-99).

In May, 1995 Sutton was selected for termination under the Plan, and was offered severance benefits (App.,

infra, at 32, 57). Shortly thereafter, Sutton discovered his "departmental officer" had not identified his department as lacking the "critical skills" described in the Plan, and that his rating under the Panel Process was contrary to its announced procedures because one of his three raters had not had any supervisory experience with Sutton within three years from the date of his evaluation. Sutton immediately raised these issues surrounding his selection under the Plan's claims procedures[1], as being contrary to the purpose of the Plan and in violation of the express terms of the Panel Process which Dunn selected for use in implementation of the Plan (App., *infra*, at 109-121). Respondent Killian denied Sutton's claim, but her reasoning was not responsive to Sutton's claims (App., *infra*, at 122-124).

Sutton appealed to the Review Committee[2] (App., *infra*, at 139-157). The Review Committee denied the

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[1] The Plan expressly provided a claims procedure under which a Plan participant could:

> . . . file a claim in writing in order to secure benefits under the Plan, or to secure a review of any other matter related to the Plan if they believe they have been treated unfairly with respect to the Plan (App., *infra*, at 91).

The express terms of the Plan also specified who had fiduciary responsibility in the administration of claims:

> [BellSouth] has delegated to the applicable [Plan] Headquarters Coordinator [Respondent Killian], the **fiduciary responsibility to review, and to grant or deny claims that are filed under the Plan** (App., *infra*, at 90).

[2] The Plan expressly provided an appeals procedure under which a Plan participant could appeal to the Plan Review

appeal, but the Review Committee's reasoning also was not responsive to Sutton's Appeal (App., *infra*, at 157-161).

Sutton then filed his Verified Amended Complaint which alleges that BellSouth violated ERISA in the administration of the Plan selection procedures, and the Plan's internal appeal process. Count I seeks to enforce Sutton's rights under the Plan under ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1). Count II seeks to enjoin further violations of the Plan under ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A). Count III seeks equitable relief to redress the harm caused by the violations under ERISA § 502(a)(3)(B)(i), 29 U.S.C. § 1132(a)(3)(B)(I) (App., *infra*, at 41-174).

B. Proceedings Below

Following the close of discovery, BellSouth moved for summary judgment on all claims, the district court granted BellSouth's motion (App., *infra*, at 7), and the court of appeals affirmed (App., *infra*, at 1).

Committee if " . . . a claim for . . . review of any other matter relating to the Plan is denied . . . " (App., *infra*, at 92-94).

The Plan also specified who had the fiduciary responsibility for reviewing appeals of denied claims:

> [BellSouth] has delegated to the [Plan] Review Committee the **fiduciary responsibility of affording a full and fair review of all appeals** resulting from denied claims or any other dispute arising out of the interpretation or administration of the Plan (App., *infra*, at 90).

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN *Varity Corp. v. Howe*, 516 U.S. 489 (1996)

In *Varity*, this Court established that " . . . ERISA § 502(a)(3) authorize[s] ERISA plan beneficiaries to bring a lawsuit . . . that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary obligations", and granted relief to individuals harmed by the breach. 516 U.S., at 492, 116 S. Ct. 1065, at 1068. The Court reached this result by holding that individuals who made false representations respecting the ERISA plan at issue were "fiduciaries" even though they were neither expressly engaging in Plan administration, nor expressly named as fiduciaries under that plan.

The Eleventh Circuit's decision in this case, however, prevents Sutton, an individual employee who was terminated under an ERISA employee benefit plan, and who had exhausted his remedies under the plan, from maintaining a suit under Section 502 (a)(3) against individuals **specifically designated as fiduciaries** by the plan for appropriate equitable relief for their failure in **administering the plan to comply with material terms of the Plan** when such failure caused his termination.

Moreover, the Eleventh Circuit's decision also prevents Sutton, a plan beneficiary, who had exhausted his remedies under the plan, from suing those same "fiduciaries" when they failed to act "solely in the interest of the participants" and "in accordance with the documents and instruments governing the plan".

The Eleventh Circuit concluded **as a matter of law** that the defendants were wearing their "employer" hat and not their "fiduciary" hat when they terminated Sutton under the terms of the Plan (App., *infra*, at 5-6). This was the argument made by the employer in *Varity*, which this Court soundly rejected. 516 U.S. 489, at 498-505, 116 S.Ct. 1065, at 1071-1074.

The BellSouth decisions that Sutton challenges in this case are far more directly related to plan administration than the statements of the employer's representatives in *Varity*. Sutton charged that BellSouth invoked the Plan even absent a request from Sutton's departmental officer; that BellSouth included Sutton in the group to be subject to selection for termination under the Plan even though BellSouth did not plan to "hire" an outsider with "critical skills" to replace Sutton; and it allowed a manager to rate and rank Sutton even though he was unqualified to do so under any reasonable standard.

All of those acts were specifically performed in implementation of the Plan itself. All of them *preceded* the payment of severance benefits under the Plan. And each clearly, in the words of this Court in *Varity*, "is an act of plan administration" because they implemented the express terms of the Plan. 516 U.S. 489, at 505, 116 S.Ct. 1065, at 1074. BellSouth thus was acting in its fiduciary capacity both in relation to these challenged acts and, indisputably, in reviewing and denying Sutton's claim and appeal.

The Eleventh Circuit's conclusion to the contrary plainly conflicts with the teachings of *Varity*, and must be

vacated and remanded if *Varity* is to have any force whatsoever.

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be granted, and this Court should vacate the decisions of the courts below and remand for further consideration in light of *Varity*.

Respectfully submitted,

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APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9328
Non-Argument Calendar

D.C. Docket No. 1:96-CV-1842-HTW

(Filed Sep. 22, 1999)

D. BARRY SUTTON,

Plaintiff-Appellant,

versus

BELLSOUTH TELECOMMUNICATIONS, INC.; BELLSOUTH TELECOMMUNICATIONS, INC., COMPETITIVE MANAGEMENT RESTAFFING PLAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(September 22, 1999)

Before COX, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Appellant Barry Sutton brought this action pursuant to the enforcement provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132. He claims that Appellee BellSouth Telecommunications, Inc. (the Company) terminated him in violation

of the express provisions of the Competitive Management Restaffing Plan (the Restaffing Plan), which is an employee welfare benefit plan established and maintained pursuant to ERISA. The district court rejected Appellant's claims and granted summary judgment in favor of the Company and the other Appellees. The district court reasoned that the Company's decision to terminate Appellant occurred apart from the decision to offer him severance benefits under the Restaffing Plan and therefore did not trigger ERISA's remedial provisions. Based upon our review of the record, we affirm.

We exercise a complete and independent review of the district court's grant of summary judgment to determine whether there are any genuine issues of material fact which preclude judgment as a matter of law in favor of the moving party. *See Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir.1998).

The Company is engaged in an ongoing effort to reduce its management workforce to ensure it maintains its competitive advantage in the marketplace. As part of this effort, the Company utilizes a process known as the Management Panel Evaluation Process (the Panel Process) to continually rank and classify employees to determine their relative abilities. Pursuant to the guidelines governing the Panel Process, the Company identifies the group, or "universe," of employees who will be considered for termination. A universe is a group of employees in a specific job grade who lack specific skills necessary to the Company, such as competitive market experience or market segment expertise. Employees within the relevant universe are then ranked by evaluators with at least

six months' significant exposure to the employees within the preceding three-year period.

In May 1995, Charles Coe, the Group President of Customer Operations, determined that supervisory employees at job grade 64 in the customer operations organization, which included Appellant, lacked sufficient expertise in several areas, including competitive market experience and experience in the wireless communications industry. Coe decided that three vacancies were necessary to address this deficit and that the Company should offer severance pay and health insurance coverage for a specified period to employees who terminated employment to create vacancies to be filled by individuals with the needed critical skills. At Coe's request, the Vice-President of Human Resources, Rebecca Dunn, approved the use of the Restaffing Plan and sent the following memorandum (Dunn Memorandum) to Company officers:

> a. The [Restaffing Plan] provides for involuntary separation of a predetermined number of managers in a defined group, where the group has been identified as having a deficit in understanding of technology, market expertise, or competitive market intelligence.
>
> b. Under the [Restaffing Plan],
>
> (1) [C]reated vacancies must be backfilled with external hires,
>
> (2) [C]reated vacancies may not be used for lateral or promotional movement, and
>
> (3) [I]ncumbents in the defined groups will be rated utilizing the [Panel Process].

The Company thereafter identified 21 employees in the relevant universe to be evaluated by the Panel Process. Three individuals evaluated Appellant and he was subsequently offered severance benefits under the Restaffing Plan in exchange for agreeing to sign a release of all claims against the Company. Appellant appealed the Company's decision to terminate him pursuant to an internal review procedure established under the Restaffing Plan. His claim was denied and he subsequently signed a partial release to receive severance benefits.[1] Meanwhile, the Company filled Appellant's position by promoting a BellSouth employee rather than by seeking an external candidate for the position.

A beneficiary of an ERISA plan may bring an action in federal court "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Additionally, a beneficiary may seek relief for breach of a fiduciary obligation for "any act or practice which violates any provision of [ERISA] or the terms of an ERISA plan." 29 U.S.C. § 1132(a)(3); *see also Varity Corp. v. Howe*, 116 S.Ct. 1065, 1076-77 (1996).

Appellant contends these remedial provisions provide him with a cause of action under federal law to challenge the decision to terminate him from employment. He contends the Restaffing Plan, which is governed

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[1] The Company permitted Appellant to sign the release and agreed not to assert it as a bar to a lawsuit brought pursuant to ERISA, provided that the suit did not exceed the scope of the issues raised in the internal review procedure.

by ERISA, incorporates the Panel Process by reference and thereby subjects his dismissal to review under ERISA. He argues the Restaffing Plan incorporates the Panel Process because: (1) the Dunn Memorandum discusses the termination process as part of the severance payments under the Restaffing Plan; and (2) the Restaffing Plan itself refers to the process for terminating employees.[2] Sutton therefore contends the Company violated his rights under ERISA by violating its guidelines for the Panel Process by: (1) improperly including him in the relevant universe of employees; (2) filling his position with a BellSouth employee rather than with an external candidate; (3) evaluating him with someone who had no personal knowledge of his work; and (4) failing to afford a full or fair review of the Company's decision to terminate him.

We conclude that the termination process is not governed by ERISA because it occurred apart from and was distinct from the process to offer severance benefits to terminated employees. Significantly, those employees selected for termination are not even required to participate in the severance pay plan. They may choose not to participate in the plan, in which case they are terminated without benefits and may pursue other remedies against the Company.

Our conclusion is also supported by the general proposition that corporate managerial decisions are not

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[2] For instance, the Restaffing Plan states that employees will be evaluated by a "procedure selected by the Participating Company." Additionally, the Restaffing Plan refers to a "rat[ing] and rank[ing]" process.

governed by ERISA because they do not involve discretionary acts regarding plan administration. *See, e.g., Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713-714 (11th Cir.1987) ("One assumes fiduciary status only when and to the extent that they function in their capacity as health plan fiduciaries, not when they conduct business that is not regulated by ERISA.") (quotation and citation omitted). In this case, Appellant is not seeking to recover benefits or to enforce or clarify his rights under the terms of a plan. He is seeking redress for the Company's decision to terminate him. Such an action does not exist under state law here because Georgia courts have refused to create a claim for wrongful termination of an at will employee. *See Borden v. Johnson*, 395 S.E.2d 628, 628-29 (Ga. Ct. App. 1990) (refusing, in the absence of a relevant statute, to create a wrongful termination claim for an at will employee). We refuse to create such a claim under ERISA in this case because the termination decision occurred apart from the management or administration of the ERISA plan. *See Varity Corp.*, 116 S.Ct. at 1072-1073.

In sum, the Company's termination decision did not involve any aspect of an ERISA plan. We therefore affirm the district court's grant of summary judgment in favor of Appellees.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. BARRY SUTTON, Plaintiff	:	CIVIL ACTION
vs.	:	1:96-cv-1842-HTW
BELLSOUTH TELECOMMUNICATIONS, INC., et al., Defendants	:	(Filed Sept. 30, 1998)

ORDER OF COURT

This matter is before the court on defendants' motion brought pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for an order granting summary judgment on the ground that plaintiff's termination is not subject to challenge under 29 U.S.C. § 1001, *et seq.*, the Employee Retirement Income Security Act of 1974 ("ERISA").

BACKGROUND

Plaintiff brings this action alleging a violation of 29 U.S.C. § 1001-1429, the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiff D. Barry Sutton ("plaintiff" or "Sutton") was employed by defendant BellSouth Telecommunications, Inc. ("BellSouth") as assistant vice-president in Atlanta, Georgia. In the instant case, in connection with defendant BellSouth Telecommunications, Inc.'s downsizing efforts, plaintiff was offered and accepted a separation payment of approximately

$200,000 and terminated his employment with the company on July 11, 1995, pursuant to a severance plan known as the Competitive Management Restaffing Plan. ("CMRP" or "Restaffing Plan"). The Restaffing Plan is a employee welfare benefit plan as defined in 29 U.S.C. § 1002, established and maintained pursuant to the ERISA.

BellSouth is engaged in an ongoing effort to reduce its management workforce and to assure that its employees possess the skills necessary for the company to remain competitive. BellSouth has established several severance plans to facilitate its force reduction. The company has also determined that although no surplus of managers exists, there is a deficit of critical skills within certain groups of managers. As a result, BellSouth has established the Restaffing Plan to provide severance pay and paid health insurance coverage for a specified period to eligible management employees who terminate employment with BellSouth in order to create vacancies that can be filled by hiring individuals with critical skills that are needed by the company.

BellSouth has used, and did use, the following procedure to address skills deficiencies under these circumstances. First, the company identifies the group or "universe" of employees who will be considered for termination. A "universe" is a group of employees in a specific job grade within a company organization that has a critical skills deficiency, such as a lack of competitive market experience or market segment expertise. Such universes are generally comprised of five or more managers. In order to determine which employees will be separated from BellSouth and offered the opportunity to

participate in the plan, BellSouth used a rating procedure known as the Management Panel Evaluation Process (or "MPEP") to rank employees within the Restaffing Plan universes.[1]

Thereafter, severance offers are made to the number of lowest ranked managers in the universe equal to the number of vacancies to be created. Managers who elect to separate under the Restaffing Plan receive a severance payment and are required to execute a release of all claims against BellSouth. If managers decline to separate under the Restaffing Plan, they are terminated without Restaffing Plan benefits.

Plaintiff was employed as an assistant vice-president in the small business unit of the company's customer operations group, reporting to Rod Odom, President – Small Business. Plaintiff's position was at the job grade 64 level under the company's job classification system. In May of 1995, Charles Coe, Group President – Customer Operations, determined that there was a critical skills deficiency among job grade 64 level employees in the customer operations organization. Specifically, Coe decided that this group – which represents the highest level of management beneath the BellSouth officers – lacked sufficient expertise in several areas, including

---

[1] The panel process involves the rating of managers on specified competencies and produces a ranking of the overall effectiveness of managers within a universe and has been used extensively outside the context of Restaffing Plan, principally to rank individuals within groups where there is a business need to reduce the number of employees. The rankings are used to determine which employees will be terminated and offered severance payments pursuant to the Restaffing Plan.

competitive market experience, profit and capital management, and experience in the wireless communications industry.

As a result, Coe requested that a Restaffing Plan be implemented to address the deficiencies. The Vice President Human Resources, Rebecca Dunn, approved the Restaffing Plan for use on May 1, 1995. In so doing, Dunn sent a memorandum to BellSouth officers that stated, in relevant part, the following:

a. The [Restaffing Plan] "provides for involuntary separation of a predetermined number of managers in a defined group, where the group has been identified as having a deficit in understanding of technology, market expertise, or competitive market intelligence."

b. Under the [Restaffing Plan],

   (1) "[C]reated vacancies must be backfilled with external hires,"

   (2) "[C]reated vacancies may not be used for lateral or promotional movement," and

   (3) "[I]ncumbents in the defined groups will be rated utilizing the Management Panel Evaluation Process ("MPEP")."

Dunn Memorandum of May 1, 1995.

The Restaffing Plan universe included the job grade 64 employees in the customer operations organization throughout BellSouth. Coe determined that three vacancies were necessary to address the critical skills deficit. In

May 1995, the MPEP process was conducted and the 21 employees in the universe were ranked. Three raters evaluated plaintiff: (1) Mr. Odom, who supervised Mr. Sutton; (2) defendant Philip S. Jacobs; and (3) Ms. Judi North, one of Mr. Sutton's former supervisors. Plaintiff was among the three lowest ranked employees and was offered severance benefits under the Restaffing Plan on May 22, 1995. Plaintiff alleges that this panel process was flawed because defendant Jacobs was not qualified to evaluate plaintiff, and that BellSouth did not fill his vacancy with an external hire.

Consistent with ERISA's requirements, the Restaffing Plan contains a claim and appeal procedure to allow an employee who feels he or she has been improperly denied severance benefits to file a claim pursuant to the Plan. Although not required by ERISA, BellSouth has allowed employees to use the procedure to challenge the application process. In the instant case after receiving his severance offer, plaintiff filed a claim and subsequent appeal. In that claim, he raised three issues: (1) that he should not have been included in the Restaffing Plan universe; (2) that two of the three raters were not qualified to rate him; and (3) that his separation was contrary to the purposes of the Restaffing Plan. The claim was denied on June 26, 1995, and plaintiff thereafter filed an appeal of the denied claim.

Prior to filing his appeal, plaintiff's attorney raised a concern with BellSouth that the appeal procedure would not be resolved prior to the deadline for plaintiff to accept his Restaffing offer by submitting the signed Election and Release. Counsel for the parties thereafter agreed that BellSouth would not assert the Election and

Release as a bar to plaintiff's pursuing the plan's appeal procedure. At the request of plaintiff's counsel, BellSouth also agreed that if the appeal were denied, BellSouth would not assert the Release as a bar to a lawsuit brought pursuant to ERISA, provided that the suit did not exceed the scope of the issues raised in the claim and appeal procedure. Thereafter, plaintiff executed the Restaffing Plan Election and Release on July 7, 1995, and received a severance payment of 150 percent of his base salary in the amount of $199,650.00.

On August 25, 1995, plaintiff filed his appeal of the denied claim. That appeal was submitted to the Restaffing Plan review committee which considered all of the information presented by plaintiff and plan administrators. The committee voted to deny the appeal, and written notification was thereafter sent to plaintiff on October 17, 1995. Plaintiff filed this action on July 18, 1996, against BellSouth, the Plan, and a number of individuals, including several BellSouth senior executives alleging that the termination of his employment was inconsistent with the provisions of the Restaffing Plan, and therefore, violated ERISA.

Defendants bring the instant motion for summary judgment contending that plaintiff does not allege that he was wrongfully denied any benefits pursuant to the Restaffing Plan, but instead alleges a claim which cannot be brought under ERISA: that because BellSouth offered and paid him severance benefits pursuant to an ERISA plan, ERISA provides him with a cause of action to challenge the termination of his employment.

DISCUSSION

Summary judgment is only proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Where supporting or opposing affidavits are used, the

> affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed. R. Civ. P. 56(e).

Because the procedure deprives the parties of a trial on the issues, the court must be careful to ensure that only those claims for which there is no need for a factual determination as to any material fact are disposed of by summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In addition, a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987). To survive a motion for summary judgment, the non-moving party need only present evidence from which the trier of fact might return a verdict in his favor. *Samples*, 846 F.2d at 1330. However, Rule 56, "[b]y

its very terms, . . . provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986) (emphasis in original). The materiality of facts is governed by the substantive law. *Id.* at 248. A dispute is genuine if the evidence is such that the factual issues "may reasonably be resolved in favor of either party." *Id.* at 250.

Consideration of a summary judgment motion does not lessen the burden on the non-moving party: the non-moving party still bears the burden of coming forth with sufficient evidence on *each element* that must be proved. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original); *see Celotex*, 477 U.S. at 322-23. "If on any part of the prima facie case there would be insufficient evidence to require submission of the case to the jury, [the court] must . . . grant . . . summary judgment for the defendant." *Earley*, 907 F.2d at 1080 (citations omitted). In *Earley*, the Eleventh Circuit further emphasized:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. . . . Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. . . . In such circumstances, there can be no genuine issue of material fact, since a complete failure of proof

> concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. . . . If the evidence is *merely colorable,* or is *not significantly probative,* summary judgment may be granted.

Id. (emphasis in original) (citations omitted).

Plaintiff's response to the motion for summary judgment indicates that plaintiff contends that because the Restaffing Plan creates a process for ranking and discharging a senior manager and a claims and appeals process, plaintiff's claims arise under ERISA. Defendants have filed this motion for summary judgment arguing that ERISA does not provide a cause of action for plaintiff to challenge the termination of his employment.

The defendants contend that plaintiff's complaint essentially purports that BellSouth treated plaintiff unfairly in deciding that he should be terminated. Specifically, plaintiff claims that his small business unit should not have been included in the universe of employees that was considered for separation, because the three new hires were going to be placed in other business units within customer operations and that the panel process was not conducted fairly because employee Jacobs and North did not have sufficient information on him on which to base their ratings.

By way of the instant motion, the defendants aver that these allegations are typical of the type of allegations asserted in wrongful discharge actions, and that it is well settled that there is no cause of action in Georgia for the wrongful discharge of an at-will employee such as plaintiff. *Borden v. Johnson,* 395 S.E.2d 628 (Ga. Ct. App. 1990);

White v. I.T.T. Corp., 718 F.2d 994 (11th Cir. 1983). Moreover, defendants argue that even if there were such a cause of action in this state, it would be unavailable to plaintiff having waived all his legal rights except those under ERISA by executing the Election and Release. Simply put, defendants contend that ERISA does not provide a cause of action for wrongful discharge cases, except under 29 U.S.C. § 1140, which is not alleged by plaintiff, but does provide the ability to bring a cause of action for the denial of benefits and for a fiduciary's breach of his or her duty under the plan of its assets 29 U.S.C. § 1132(a).

There is no dispute between the parties as to the fact that there exists a complete absence of case law to support plaintiff's novel legal theory. The defendants, however, have provided a Fourth Circuit case, *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989), where the Court affirmed the district court's order granting the defendant's motion to dismiss for failure to state a claim, holding:

> *We reject appellant's attempt to transform the provisions of this early retirement plan into a forum for a wrongful discharge action.* . . . An employee's discharge may properly be litigated pursuant to Title VII of the Civil Rights Act on 1964, the Age Discrimination in Employment Act of 1967, the relevant collective bargaining agreement, or exceptions to the employee at will doctrine. If there is a wrongful discharge, the remedial provisions of the foregoing actions may well encompass an award of benefits. *To subject employers to a potential waterfall of wrongful discharge actions, by permitting plan participants to litigate the correctness of their discharge through the "full and fair review" provision of ERISA, would*

discourage employers from instituting early retirement plans, which ERISA does not require.

875 F.2d at 1078 (citations omitted) (emphasis added)

By way of its opposition to defendants' motion for summary judgment, plaintiff attempts to distinguish *Dzinglski,* stating that because the case does not involve a benefit plan that encompasses any part of the discharge process, it is not applicable to the instant case. Before proceeding any further, the court will address this issue of significant import.

Plaintiff is essentially arguing that the ERISA law is applicable because the Restaffing Plan encompassed the discharge process. This is a conclusion not supported by the facts in this case. The court has determined that the MPEP is merely the mechanism by which BellSouth determined which employees would be terminated. The Restaffing Plan is a severance pay plan, the purpose of which is to provide assistance to eligible employees who are being terminated. Those selected for termination through the MPEP process or otherwise are not required to participate in the severance pay plan. They may elect not to participate nor sign a release waiving their rights against the company in which case they are terminated without benefits. Accordingly, the termination decision and the payment of severance benefits under the plan are separate processes, and it is only the latter that implicates ERISA.

Plaintiff argues, however, that the Dunn memorandum of May 1, 1995 is sufficient to bind these two processes together because the memorandum states in relevant part that:

b. Under the [Restaffing Plan],

(1) "[C]reated vacancies must be backfilled with external hires,"

(2) "[C]reated vacancies may not be used for lateral or promotional movement," and

(3) "[I]ncumbents in the defined groups will be rated utilizing the Management Panel Evaluation Process ("MPEP")."

Dunn Memorandum of May 1, 1995.

The court will not merge these processes together because the Dunn memorandum is insufficient in and of itself to extend ERISA's coverage to support a challenge, not of the severance benefits provided by a plan, but of the underlying business decision of how and who to select for employment termination. Moreover, a review of the Restaffing Plan itself reveals that the MPEP process is not part of the ERISA plan. The Restaffing Plan is devoid of any language describing or referencing the MPEP. Even more convincing is the fact that the Restaffing Plan states that "an evaluation procedure selected by *the Participating Company*" will be used to rate and rank the overall effectiveness of each manager in the group (emphasis added). This language clearly illustrates that those involved in making employment decisions, not the Plan fiduciaries, are responsible for deciding the process to be used to terminate employees.

Furthermore, the MPEP guidelines about which plaintiff complains were not included in, appended to, or

even referenced in the Restaffing Plan. The plan document does state, however, that it "is intended to serve as both the full text of the BST Competitive Management Restaffing Plan as well as a Summary Plan Description of such plan." Not only does the Restaffing Plan document make no reference to the MPEP, but neither do the MPEP guidelines make reference to the Restaffing Plan. It is basic rule of document construction that when certain matters are mentioned in a document, "other similar matters not mentioned were intended to be excluded." *Plumbers and Steamfitters Local No. 150 Pension Fund v. Vertex Construction Co.*, 932 F.2d 1443, 1449 (11th Cir. 1991). Further, in support of their motion for summary judgment, defendants provide evidence that the MPEP process is mostly used to identify employees for termination outside the context of employment decisions unrelated to the Restaffing Plan. The court is also mindful that while the Restaffing Plan makes no specific reference to the MPEP guidelines, it does specifically provide that the election and release form that a participant must sign in order to receive benefits is attached to the Plan as Addendum B and is "incorporated as part of the Plan." Applying the *Plumbers and Steamfitters* principle in this case, since the Plan document specifically incorporates by reference the release form, but does not so incorporate the MPEP guidelines, the court has determined that the MPEP guidelines were not intended to be and were not incorporated in the plan as plaintiff complains. The court does not have the discretion to add clauses to the Restaffing Plan that the parties have chosen not to include.

Plaintiff's complaint seeks to ask this court to create for him a cause of action that not only has never been

adopted by any court, but appears to be at odds with the purpose of ERISA. As the Supreme Court has instructed, "courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA." *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 158 (1985) (Brenan, J., concurring). ERISA does not create a cause of action where none exists. *Liberty Corp. V. NCNB Nat. Bank of South Carolina,* 786 F.Supp. 552, 554 (E.D. Va. 1992).

The ERISA, as explained by the United States Senate Committee on Finance,

> is designed to make pension profit-sharing, and stock bonus plans more effective in providing retirement income for employees who have spent their careers in useful and socially productive work. It encourages provision for the retirement needs of many millions of individuals. At the same time, the committee recognized that private retirement plans are voluntary on the part of the employer, and, therefore, it has carefully weighed the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits.
>
> In broad outline, the bill is designed –
>
> (1) to increase the number of individuals participating in retirement plans;
>
> (2) to make sure that those who do participate in such plans do not lose their benefits as a result of unduly restructive forfeiture provisions or failure of

> the plan to accumulate and retain sufficient funds to meet its obligations; and
>
> (3) to make the tax laws relating to such plans fairer by providing greater equality of treatment under such plans for the different taxpaying groups involved."

93d Cong. (2d Sess.). 1974 U.S. Code Cong. & Admin. News, p. 4890.

To accomplish these goals, the statute imposes participation, funding and vesting requirements on pension plans. It also sets various uniform standards for reporting, disclosure and fiduciary responsibility under both pension and welfare plans. However, the ERISA does not mandate that employers provide any particular benefits. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2897, 77 L.Ed.2d 490 (1983).

It is the determination of the court that allowing plaintiff to pursue such a claim challenging the selection process for terminating BellSouth's employees would substantially undermine, rather than further, the purposes of ERISA. Permitting plaintiff to pursue such a claim would undoubtedly discourage the establishment of severance plans, if by providing benefits to an employee, liability for employers who discharge employees were created where none would otherwise exist. The court finds that plaintiff may not challenge the termination of his employment through the ERISA plan, and therefore, cannot prevail as a matter of law. Accordingly, defendants' motion for summary judgment is hereby GRANTED.

CONCLUSON

In view of the foregoing, the defendants' motion for summary judgment is hereby GRANTED.

SO ORDERED, this 29th day of September, 1998.[2]

/s/ Horace T. Ward
HORACE T. WARD,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

ENTERED ON DOCKET

OCT 01 1998

L.D.T., CLERK
By
DEPUTY CLERK

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[2] As a courtesy to the clerk, the court notes that this order terminates docket entry no. 24.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. BARRY SUTTON, Plaintiff, v. BELLSOUTH TELECOMMUNICATIONS, INC., BELLSOUTH TELECOMMUNICATIONS, INC. COMPETITIVE MANAGEMENT RESTAFFING PLAN, REBECCA DUNN, CHARLES B. COE, PHILLIP JACOBS, JULIA "JUDI" NORTH, JANE KILLIAN, and BST CMRP REVIEW COMMITTEE (R. C. MCLAUGHLIN AND JOHN AND JANE DOES NUMBERS AND IDENTITIES UNKNOWN), Defendants.	)	Civil Action File No. 1:96-CV-1842-HTW

ANSWER

Defendants BellSouth Telecommunications, Inc. ("BST"), the BellSouth Telecommunications, Inc. Competitive Management Restaffing Plan ("BST CMRP" or "the Plan"), Rebecca Dunn, Charles Coe, Phillip Jacobs, Julia

North, Jane Killian, and the BST CMRP Review Committee (collectively "Defendants")[1], in response to the Verified Amended Complaint ("Complaint") filed by Plaintiff D. Barry Sutton, hereby answer as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

To the extent Plaintiff's claims relate to matters that he did not properly raise pursuant to the claim and appeal procedures of the Plan, they are barred by his failure to exhaust his remedies under the Plan.

THIRD DEFENSE

To the extent Plaintiff's claims relate to matters he did not properly raise pursuant to the claim and appeal procedures of the Plan, they are barred by the Election and Release that Plaintiff executed.

FOURTH DEFENSE

Defendants are entitled to a setoff for the amount the severance payment paid to Plaintiff pursuant to the Plan ($199,650.00), plus interest, as well as for the value of the

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[1] Althought Carter McLaughlin is identified in the caption, he is named only as a member of the CMRP Review Committee and, in any case, has never been served in this action.

other benefits provided to Plaintiff as a result of his participation in the Plan.

FIFTH DEFENSE

Plaintiff's claims are barred by the equitable doctrine of waiver and estoppel.

SIXTH DEFENSE

Responding to the specific numbered paragraphs of the Complaint, and using the same numbers that appear therein, Defendants answer as follows:

1.

Defendants admit that this action is brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, ("ERISA"), but deny the remaining allegations in paragraph 1 of the Complaint.

2.

Defendants admit that this Court has jurisdiction of this action.

3.

Defendants admit that venue is proper in this Court.

4.

Defendants admit that prior to instituting this action Plaintiff filed a claim and appeal under the Plan. Except

as otherwise expressly admitted, Defendants deny the allegations in paragraph 4 of the Complaint.

5.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Complaint and therefore deny them.

6.

On information and belief, Defendants admit the allegations in paragraph 6 of the Complaint, except that Defendants' records indicate that Mr. Sutton is 49 years old.

7.

Defendants admit that Plaintiff was a participant in the Plan, but otherwise deny the allegations in paragraph 7 of the Complaint.

8.

Defendants admit the allegations in paragraph 8 of the Complaint.

9.

Defendants admit the allegations in paragraph 9 of the Complaint.

10.

Defendants admit the allegations in paragraph 10 of the Complaint.

11.

Defendants admit the allegations in paragraph 11 of the Complaint.

12.

Defendants admit that Mr. Coe recommended use of the Plan for Plaintiff's universe. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 12 of the Complaint.

13.

Defendants admit that Mr. Jacobs and Ms. North rated Plaintiff pursuant to the Panel Evaluation Process that was used to select individuals for participation in BST CMRP. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 13 of the Complaint.

14.

Defendants admit the allegations in paragraph 14 of the Complaint.

15.

Defendants admit that the BST CMRP Review Committee has been delegated the fiduciary responsibility of reviewing appeals of denied claims arising under the Plan. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 15 of the Complaint.

16.

Defendants admit that BST CMRP was issued effective May 1, 1995 and the purpose of the Plan is to provide severance assistance to eligible management employees who are terminating employment with BST so that BST can hire individuals who possess critical skills that BST requires in order to compete in the telecommunications industry. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 16 of the Complaint.

17.

Defendants admit that in May of 1995, Mr. Sutton was a Job Grade 64 Assistant Vice President in the Small Business unit of BST's Customer Operations organization, reporting to R. D. Odom, Vice President of the Small Business unit, and that Mr. Sutton had various responsibilities with respect to the Company's Small Business market segment. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 17 of the Complaint.

18.

Defendants admit that beginning in 1994, Mr. Odom was the Vice President of BST's Small Business unit and that Mr. Sutton was one of the assistant vice presidents who reported to Mr. Odom. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 18 of the Complaint.

19.

Defendants admit that Mr. Sutton was rated by his subordinates in approximately January of 1995 in an "upward feedback" process. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 19 of the Complaint.

20.

Defendants admit that in May of 1995, Mr. Sutton's annual base salary was $132,100.00, that he was assigned to salary group 2 at that time, and that he had received a pay increase of $3,900.00 per year effective March 1, 1995. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 20 of the Complaint.

21.

Defendants admit the allegations in paragraph 21 of the Complaint.

22.

Defendants admit with respect to paragraph 22 of the Complaint that the language of the BST CMRP plan document speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 22 of the Complaint.

23.

Defendants deny the allegations in paragraph 23 of the Complaint.

24.

Defendants deny the allegations in paragraph 24 of the Complaint.

25.

Defendants deny the allegations in paragraph 25 of the Complaint.

26.

Defendants admit that Plaintiff was included in a universe of Job Grade 64 employees. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 26 of the Complaint.

27.

Defendants deny the allegations set forth in paragraph 27 of the Complaint.

28.

Defendants admit with respect to the allegations in paragraph 28 of the Complaint that the language of the BST CMRP plan document speaks for itself. Defendants further admit that the Panel Evaluation Process was used to rank employees to determine which employees would be offered the opportunity to participate in BST CMRP. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 28 of the Complaint.

29.

Defendants admit with respect to the allegations in paragraph 29 of the Complaint that the Management Panel Evaluation Process Guidelines for the Selection of Panelists document speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 29 of the Complaint.

30.

Defendants admit that Plaintiff was rated pursuant to the Panel Evaluation Process by Mr. Odom, Ms. North, and Mr. Jacobs. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 30 of the Complaint.

31.

Defendants deny the allegations in paragraph 31 of the Complaint, including all subparts thereof.

32.

Defendants deny the allegations in paragraph 32 of the Complaint.

33.

Defendants deny the allegations in paragraph 33 of the Complaint.

34.

Defendants admit the allegations in paragraph 34 of the Complaint.

35.

Defendants admit with respect to paragraph 35 of the Complaint that the language of BST CMRP Plan document speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 35 of the Complaint.

36.

Defendants admit with respect to paragraph 36 of the Complaint that Mr. Sutton received the appropriate Plan documents on May 22, 1995 and that the documents he was provided speak for themselves. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 36 of the Complaint.

37.

Defendants admit with respect to paragraph 37 of the Complaint that Plaintiff filed a claim pursuant to the Plan. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 37 of the Complaint.

38.

Defendants admit with respect to the allegations in paragraph 38 of the Complaint that Plaintiff's claim under the Plan was denied and that the claim denial letter speaks for itself.

39.

Defendants deny the allegations in paragraph 39 of the Complaint.

40.

Defendants admit that Plaintiff's claim under the Plan was denied on June 26, 1995 and that Plaintiff had the right to appeal the denial of that claim. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 40 of the Complaint.

41.

Defendants admit the allegations in paragraph 41 of the Complaint.

42.

Defendants admit with respect to the allegations in paragraph 42 of the Complaint that the referenced document speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 42 of the Complaint.

43.

Defendants admit with respect to the allegations in paragraph 43 of the Complaint that the referenced document speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 43 of the Complaint.

44.

Defendants admit with respect to the allegations in paragraph 44 of the Complaint that the referenced documents speak for themselves. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 44 of the Complaint, including all subparts thereof.

45.

Defendants deny the allegations in paragraph 45 of the Complaint.

46.

Defendants admit with respect to the allegations in paragraph 46 of the Complaint that the letter agreement

referenced speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 46 of the Complaint.

47.

Defendants admit that Mr. Sutton executed the BST CMRP Election and Release. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 47 of the Complaint.

48.

Defendants deny the allegations in paragraph 48 of the Complaint.

49.

Defendants admit the allegations in paragraph 49 of the Complaint.

50.

Defendants admit that Plaintiff's appeal under the Plan was denied on October 17, 1995. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 50 of the Complaint, including all subparts thereof.

51.

Defendants deny the allegations in paragraph 51 of the Complaint.

52.

Defendants admit with respect to the allegations in paragraph 52 of the Complaint that Mr. Sutton sent a letter dated October 27, 1995 to Mr. H. C. Henry, and that the letter speaks for itself. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 52 of the Complaint, including all subparts thereof.

53.

Defendants deny the allegations in paragraph 53 of the Complaint.

54.

Defendants admit that BST and Plaintiff have entered into an escrow agreement whereby Plaintiff has tendered the amount of $79,265.00 into escrow and that BST has agreed to accept that amount as compliance with the escrow condition of the parties' letter agreement of July 7, 1995, subject to the understanding that by doing so BST will not be prejudiced in its ability to claim a setoff for the full amount of Plaintiff's BST CMRP severance payment. Except as otherwise expressly admitted, Defendants deny the allegations in paragraph 54 of the Complaint.

55.

Defendants incorporate by reference the preceding paragraphs of this Answer as if set forth fully herein.

56.

Defendants deny the allegations set forth in paragraph 56 of the Complaint.

57.

Defendants admit with respect to paragraph 57 of the Complaint that Plaintiff seeks the relief requested therein, but deny that Plaintiff is entitled to such relief or any relief whatsoever.

58.

Defendants incorporate by reference the preceding paragraphs of this Answer as if set forth fully herein.

59.

Defendants deny the allegations in paragraph 59 of the Complaint.

60.

Defendants admit with respect to paragraph 60 of the Complaint that Plaintiff seeks the relief requested therein, but deny that Plaintiff is entitled to such relief or any relief whatsoever.

61.

Defendants incorporate by reference the preceding paragraphs of this Answer as if set forth fully herein.

62.

Defendants deny the allegations in paragraph 62 of the Complaint.

63.

Defendants deny the allegations in paragraph 63 of the Complaint.

64.

Defendants deny the allegations in paragraph 64 of the Complaint.

65.

Defendants deny the allegations in paragraph 65 of the Complaint.

66.

Defendants deny the allegations in paragraph 66 of the Complaint.

67.

Defendants admit with respect to paragraph 67 of the Complaint that Plaintiff seeks the relief requested therein, but deny that Plaintiff is entitled to such relief or any relief whatsoever.

Defendants deny each and every allegation in the Complaint not expressly admitted above.

WHEREFORE, Defendants request that:

1. The Complaint be dismissed in its entirety;

2. Judgment be entered against Plaintiff and in favor of Defendants;

3. Defendants be awarded their costs, attorneys' fees and expenses in the amount and manner permitted by applicable law; and

4. This Court award such other and further relief as is just and proper.

Respectfully submitted,

/s/ Keith W. Kochler (by PTJ)
KEITH W. KOCHLER
Georgia Bar No. 427450

/s/ Paul T. Stagliano
PAUL T. STAGLIANO
Georgia Bar No. 674015
BellSouth Telecommunications, Inc.
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 335-0734

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that I have this day served upon counsel for Plaintiff a copy of Defendants' Answer, by depositing same in the United States Mail, with adequate postage thereon, addressed as follows:

H. Lamar Mixson, Esq.
Bondurant, Mixson & Elmore, LLP
3900 One Atlantic Center
1201 W. Peachtree Center
Atlanta, Georgia 30309-3417

This 7th day of February, 1997.

/s/ Paul T. Stagliano
PAUL T. STAGLIANO
ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF GEORGIA
ATLANTA DIVISION

D. BARRY SUTTON, Plaintiff, vs. BELLSOUTH TELECOMMUNICATIONS, INC., BELLSOUTH TELECOMMUNICATIONS, INC. COMPETITIVE MANAGEMENT RESTAFFING PLAN, REBECCA DUNN, CHARLES B. COE, PHILLIP JACOBS, JULIA "JUDI" NORTH, JANE KILLIAN, and BST CMRP REVIEW COMMITTEE (R.C. MCLAUGHLIN AND JOHN AND JANE DOES NUMBERS AND IDENTITIES UNKNOWN), Defendants.	*	CIVIL ACTION FILE NO. 1:96-CV-1842 (Filed Jan. 15, 1997)

VERIFIED AMENDED COMPLAINT

Plaintiff, D. Barry Sutton ("Plaintiff" or "Sutton"), alleges the following in support of this Amended Complaint:

Preliminary Statement

1.

This is a suit arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*

("ERISA"), by an employee welfare benefit plan participant to enforce the provisions of defendant BellSouth Telecommunications, Inc.'s Competitive Management Restaffing Plan ("the Plan"), an employee welfare benefit plan under ERISA, and to enjoin certain of defendant BellSouth Telecommunications, Inc.'s acts or practices that violated and are violating the Plan and ERISA. Plaintiff seeks back pay, front pay, injunctive relief, and other appropriate equitable relief, all as more particularly set forth in this Amended Complaint.

Jurisdiction and Venue

2.

This court has jurisdiction pursuant to § 502(e) and (f) of ERISA, 29 U.S.C. § 113 2(e) and (f).

3.

Venue is properly laid in this district pursuant to § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2), because, as alleged more particularly in paragraph 9 below, defendant BellSouth Telecommunications, Inc. ("BST") "may be found" in the Northern District of Georgia.

Conditions Precedent

4.

Sutton has exhausted the administrative remedies provided in the Plan by timely filing a claim and an appeal under the Plan's claims procedure, both of which have been denied, as more particularly alleged below.

5.

Copies of this Amended Complaint have been served by certified mail on the United States Secretary of Labor and the United States Secretary of the Treasury in compliance with § 502(h) of ERISA, 29 U.S.C. § 1132(h).

The Parties

6.

Sutton is a citizen and resident of Fulton County, Georgia. Sutton's date of birth, is July 10, 1947, and he is now 48 years old. Plaintiff was employed by defendant BST from January 10, 1972 until July 11, 1995. During that period, plaintiff was an "employee" within the meaning of § 302(6) of ERISA, 29 U.S.C. § 1002(6).

7.

From early May 1995, when Sutton was selected for inclusion within a "universe" of employees to be rated and considered for separation from employment under the terms of the Plan, plaintiff was and is now a "participant" in the Plan within the meaning of § 302(7) of ERISA, 29 U.S.C. § 1002(7).

8.

On May 22, 1995, BST informed Sutton that he had been selected for separation from employment under the provisions of the Plan.

9.

Defendant BST is a corporation authorized to do business and, at all times pertinent to the events described in this Amended Complaint, has been doing business in the state of Georgia within the Northern District of Georgia. Defendant BST therefore "may be found" in this District within the meaning of § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2). At all times pertinent to the events described in this Amended Complaint, BST was the Plan's "administrator" and "plan sponsor" within the meaning of § 302 (16)(A) and (B), respectively, of ERISA, 29 U.S.C. § 1002(16)(A) and (B).

10.

The defendant Plan is an "employee welfare benefit plan" within the meaning of § 302(1) of ERISA, 29 U.S.C. 1002(1), and a "plan" within the meaning of § 302(3) of ERISA, 29 U.S.C. 1002(3). The Plan specifically provides that the "people who operate your Plan, called 'fiduciaries' of the Plan, have a duty to do so in accordance with the Plan's terms and in the interest of you and other Plan participants." Plan, p. 10, paragraph entitled "RIGHTS OF A PLAN PARTICIPANT." A true and correct copy of the Plan is attached as Attachment I to this Amended Complaint.

11.

Defendant Rebecca Dunn ("Dunn") is BST's Vice President with human resources responsibility to whom

BST expressly delegated "the overall fiduciary responsibility for administering [the Plan] on behalf of BST . . . and for making determinations, consistent with the terms of the Plan, concerning when and to which individuals or groups [the Plan] will be offered." Plan, p. 6. Dunn is therefore a "fiduciary" with respect to the Plan within the meaning of § 302(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

12.

Defendant Charles B. Coe ("Coe") is the BST Group Vice President who approved or requested the approval of the Plan "universe," or selected group of employees, in which Sutton was rated, and chose or approved Sutton's raters for application of the Plan. Coe therefore possessed "discretionary authority or discretionary responsibility in the administration of [the] plan"; Coe is a "fiduciary" with respect to the Plan within the meaning of § 302(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

13.

Defendants Phillip Jacobs ("Jacobs") and Julia "Judi" North ("North"), as BST Vice Presidents whom defendants BST, Dunn and Coe selected or allowed to be selected to rate Sutton under the Plan, possessed "discretionary authority or discretionary responsibility in the administration of [the] plan"; Jacobs and North therefore are each a "fiduciary" with respect to the Plan within the meaning of § 302(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

14.

Defendant Jane Killian ("Killian") is BST's Competitive Management Restaffing Plan Headquarters Coordinator to whom BST expressly delegated "the fiduciary responsibility to review, and to grant or deny claims that are filed under the Plan." Plan, p. 6. Killian is therefore a "fiduciary" with respect to the Plan within the meaning of § 302(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

15.

Defendants BST CMRP Review Committee (R.C. McLaughin and John and Jane Does Numbers and Identities Unknown) (collectively "Review Committee"), on information and belief, were appointed by BST to be the Review Committee for the Plan, to whom BST expressly delegated "the fiduciary responsibility of affording a full and fair review of all appeals resulting from denied claims or any other dispute arising out of the interpretation or administration of the Plan." Plan, p. 6. Each member of the Review Committee is therefore a "fiduciary" with respect to the Plan within the meaning of § 302(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

General Allegations

16.

Effective May 1, 1995, BST issued the Plan. The express purpose of the Plan was to " . . . provide severance assistance to eligible management employees who are terminating employment with . . . BST . . . ***so that BST can hire individuals who possess critical skills that BST***

requires in order to compete in the telecommunications industry." Plan, p. 1, paragraph entitled "Purpose" (emphasis added). The Plan was therefore not a "downsizing" initiative but rather was designed to create vacancies so BST could then *attract* employees with the specific skills enumerated in the Plan. Such employees, presumably, would replace existing BST employees who did not possess the critical skills described in the Plan.

17.

In May of 1995 Sutton was a job grade 64 ("JG64") Assistant Vice President in the Small Business Unit of the Customer Operations Organization, reporting to R.D. Odom, Vice President of Small Business ("Odom"). Sutton was initially assigned to report to Odom in May of 1992. In 1992 Odom was the Vice President responsible for BST's Marketing Staff Organization. Sutton's assignment was to direct BST's efforts in evaluating the current and future small business market segment to enhance BST's understanding of the nature of the small business customer in significant detail, to assess the value of this market segment to BST, and to make recommendations as to the scope, nature and timing of any changes BST should implement consistent with these findings. This special assignment for Sutton was part of an overall study effort within BST known as the Foundation Network Study ("FNS II"), the purpose of which was to develop BST's strategies and directions going forward. Sutton selected team members for this study from throughout BST to represent some of BST's various disciplines and to serve as the working team to gather information, conduct and analyze research, and to assist with

the formulation of conclusions. Outside consultants also worked with Sutton and the team in this capacity. The task force members ultimately assembled reported to Sutton for the project.

18.

Sutton's FNS II assignment lasted until January of 1994. As a result of his team's findings and recommendations, BST established a distinct unit in the beginning of 1994 to focus on the small business market segment. Odom was named as the officer for the new Small Business Unit and Sutton was named as one of three Assistant Vice Presidents who would be responsible for establishing and directing the operations of this unit. Sutton continued in this capacity until his separation from BST.

19.

In February of 1995, Sutton was rated by his subordinates in an anonymous, formal "Upward Feedback Process." The reported results of this process reflect Sutton's well-developed leadership skills and his success in taking action, developing others, and communicating with subordinates.

20.

In May of 1995 Sutton's annual base salary was $133,100. His performance was excellent. Specifically, Sutton's most recent performance reviews put him in "Band 2," the second highest of 4 levels, and in February of 1995 he received a pay increase of $3,900 per year. This was the

maximum discretionary pay increase allowed for individuals rated in performance Band 2 who were at Sutton's pay level. He also received a discretionary team award of 120% of standard, which recognized that his personal contributions and accomplishments were substantial and significant.

21.

In addition to the Small Business Unit, in May of 1995 the other BST Customer Operation Units ("Units") were: the Consumer (or Residential) Unit, headed by North; the Complex (or Large Business) Unit, headed by Jacobs; and the Interconnect Unit, headed by Vice President Richard Anderson. Each of these Units are organized around and focus on BST's distinct market segments.

22.

Under the express terms of the Plan, its use was to be initiated at ***"the request of the departmental officer within whose organization [i.e., Unit] the deficit in competitive skills exists,"*** and "approved by" defendant Dunn. Plan p. 1 (emphasis added), paragraph entitled "Administration." To select employees who ultimately would be offered severance benefits under the Plan, the Plan provided that "universes," or selected groups of employees, would be approved ***"within organizations that have been identified as having a critical skill deficiency ["Competive Skills Deficiency"] in areas such as understanding technology, market segment expertise, or competitive market intelligence"***; Plan participants would then be selected from the universes. Plan, p. 3

(emphasis added), paragraph entitled "Identifying and Selecting BST CNMP Plan Participants."

23.

During the initial implementation stages of the Plan, the "departmental officer" of Sutton's Unit, Odom, did not request application of the Plan to his organization at the JG64 level because he did not believe there was a Competitive Skills Deficiency at that level. Indeed, Odom believed Sutton and others at the JG64 level in the Small Business Unit possessed the competitive skills outlined in the Plan, and advised Sutton and others of this fact. Sutton's experience and performance reviews confirm the accuracy of Odom's assessment, demonstrating that Sutton possessed competitive skills in areas identified in the Plan as desirable, such as " . . . understanding technology, market segment expertise [and] competitive market intelligence. . . . " Plan p. 3. In contrast, Odom requested application of the Plan at the job grade 61 ("JG61") level to a greater percentage of employees in his department than did any of the other BST Units.

24.

In at least three instances, other employees were not subjected to application of the Plan when no Competitive Skills Deficiency was declared at their level within their Unit. In other instances, universes consisting of as few as three individuals were constructed where a Competitive Skills Deficiency was declared. Building universes in this manner, *i.e.*, within each Unit at each job grade level, would have ensured that any actual force elimination

occurred from those Units where a Competitive Skills Deficiency was in fact acknowledged and declared by each Unit's departmental officer, consistent with the letter and the spirit of the Plan.

25.

There were a sufficient number of individuals at the JG64 level to construct a universe of adequate size under the Plan by either combining those Units where a Competitive Skills Deficiency had in fact been declared at the JG64 level, or by forming individual universes within each Unit where such a declaration was made, as was done with all other job grades in the Units. All universes other than JG64 ***were*** constructed within specific Units.

26.

Nonetheless, a decision was made by someone other than Odom (Sutton's "departmental officer") to include Sutton in the universe of JG64 employees who would be evaluated under the Plan. This action created the anomaly of exposing Sutton, the employee whom BST had specifically commissioned to develop BST's strategy to become more effective in the highly competitive small business marketplace, who performed that task with sufficient distinction to be selected to head a significant operational component of BST's Small Business Unit charged with executing that competitive strategy, and who performed that job in a superior fashion, to application of the Plan which, by its own terms, was *only* to be applied to employees in a Unit which was identified as having a Competitive Skills Deficiency.

27.

As a result, defendants Dunn or Coe or both violated the express terms of the Plan and the Plan's purpose in approving Sutton's inclusion in a universe to be evaluated under the Plan.

28.

The Plan provided that "the overall effectiveness of each manager" in each such universe would be "rated and ranked, from highest to lowest" using "an evaluation procedure selected by [BST]." Plan, p. 3, paragraph entitled "Identifying and Selecting BST CMRP Plan Participants." Defendants BST and Dunn selected an evaluation procedure called the Management Panel Evaluation Process ("MPEP") to implement the Plan. MPEP was a mechanized procedure for anonymously collecting and tabulating rating data. Because the rating procedure was anonymous, no individual rater's rating of any employee (including Sutton) was subject to any review whatsoever.

29.

As a part of the implementation of this part of the Plan, defendants BST and Dunn promulgated the "Management Panel Evaluation Guidelines for the Selection of Panelists" ("MPEP Guidelines") ***"to ensure the fairness of the process for the individuals being rated"*** (emphasis added). A true and correct copy of the MPEP Guidelines is attached to this Amended Complaint as Attachment 2. The MPEP Guidelines provide in pertinent part:

Departments are responsible for identifying appropriate raters for each panel, ***for ensuring the raters meet the panelists selection criteria,*** for ensuring they fully understand their responsibilities under the process, and for obtaining their concurrence to participate in the process. There should be a ***minimum of two*** (preferably three) and a maximum of five raters for each individual being rated.

The following guidelines for the selection of panelists have been established to ensure the fairness of the process for the individuals being rated:

WORKING RELATIONSHIP:

The following individuals from ***within the department*** are appropriate raters for an individual ***provided they meet the other panelist selection criteria:***

Current Supervisor
Current Supervisor's Supervisor (*i.e.*, boss' boss's boss of the ratee)
Former Supervisor
Former Supervisor's Supervisor (*i.e.*, former boss of the ratee)

Peers of the ratee's current supervisor or current boss' boss within the department.

* * *

KNOWLEDGE OF RATEES:

Raters must be sufficiently knowledgeable such that they can evaluate the ratees that they are to rate on all five competencies that have been

selected by the department for use in the process.

LENGTH OF WORK EXPOSURE:

A minimum of six months of significant exposure, as could be gained through a supervisory or other frequent contact relationship, or approximately twelve months or more of regular work-related interaction.

TIME FRAME FOR WORK EXPOSURE:

Supervisory or other work-related exposure to the work of a [sic] ***individual should have been within the past three years.***

Attachment 2 (emphasis added).

30.

Sutton was rated under MPEP by Odom and, contrary to the MPEP Guidelines, defendants Jacobs and North. Only Odom met the panelist selection criteria set forth in the MPEP Guidelines. But, as noted in paragraph 29, above, a minimum of two raters was required to rate employees under MPEP.

31.

Neither defendant Jacobs nor North met the MPEP panelist selection criteria because neither had six months of significant exposure to Sutton such as could be gained through a supervisory or other frequent contact relationship with him or approximately twelve months or more of regular work-related interaction with him from well

before May of 1992, more than three years prior to the rating procedure. Further, neither Jacobs nor North could have been sufficiently knowledgeable of Sutton's performance in the three years preceding their rating of him to evaluate him on any, much less all five, of the general competencies on which they were required to rate him: Developing Others, Making Decisions, Organizing, Planning, and Taking Action (the "Rated Competencies"). Specifically:

A. Except for large conferences or meetings of a general nature, such as annual Senior Manager Conferences, or meetings not pertaining to the work being performed by Sutton, Sutton had not been in so much as a single business meeting with either Jacobs or North in more than two years. Prior to that time and going back to May of 1992 (over three years), Sutton has only been in a single, minor business meeting with each one.

B. During the three years immediately prior to rating Sutton under the Plan, neither North nor Jacobs has had "significant exposure" to, or "regular work-related interaction" with, Sutton or his work such that Jacobs or North would be qualified to rate Sutton's performance in any, much less all, of the Rated Competencies for the JG64 universe.

C. Sutton has had no work-related contact with Jacobs whatsoever since Jacobs reached a higher rank than Sutton. Between 1991 and May of 1992, they were peers in the same organization for a short period of time, until Sutton left Premises Marketing (BST's competitive sales organization) and

moved to the FNS II project. Jacobs has never been Sutton's supervisor.

D. Sutton last worked with North in early 1991. During this period, North gave Sutton the highest possible ratings, as well as discretionary individual bonus awards that were among the very highest awarded in the department.

32.

Notwithstanding the above, in violation of the Plan and their fiduciary duties under ERISA, both Jacobs and North apparently took it upon themselves to rate Sutton in the Rated Competencies, and neither Dunn nor Coe reviewed Jacob's or North's decision to rate Sutton. Apparently, Jacobs or North or both of them gave Sutton sufficiently low ratings that he was selected for separation from employment under the Plan. Sutton, of course, did not know of their participation until after his selection. Because he was unaware of who was rating him, Sutton had no opportunity to challenge the qualifications of either North or Jacobs to rate him under the Plan. Finally, because the rating results were anonymous, neither BST, nor Killian, nor the Review Committee could meaningfully (much less fully and fairly) review Jacob's or North's MPEP rating of Sutton. Defendants the Plan, Dunn, and Coe arbitrarily and capriciously, in violation of the Plan and their fiduciary duties under ERISA, authorized, suffered or permitted North and Jacobs to misapply and violate the Plan in this manner.

33.

Moreover, the Rated Competencies set forth in MPEP, which was adopted by the defendants as the rating system for application of the Plan, are not the competencies that the Plan was expressly designed to enhance or improve. To rate Sutton and the other JG64 employees under the Plan, defendants BST and Dunn selected the Rated Competencies from a "competency master list" which had been used in BST's earlier general downsizing initiatives. Defendants BST and Dunn selected the Rated Competencies rather than the specific competencies (the competitive skills, *i.e.*, "understanding technology," "market segment expertise," and "competitive market intelligence") (Plan, p. 3) expressly identified as the relevant criteria by the Plan. Thus, Sutton, who indisputably possessed the Competitive Skills BST sought to develop in its work force through the use of the Plan, was exposed to rating under MPEP by two unqualified raters on the Rated Competencies, which had nothing whatever to do with the competitive skills that the Plan expressly was designed to retain or acquire.

34.

On May 22, 1995, Sutton was told that he had been selected for separation from employment under the Plan and received a copy of the Plan, together with related forms, which are more particularly described in paragraph 36 below.

35.

The Plan provided that managers like Sutton "offered but declining separation under the provisions of the Plan will be terminated without benefits under the Plan." Plan, p. 3, paragraph entitled "Identifyiiig and Selecting BST CMRP Plan Participants."

36.

On May 22, 1995, when Sutton was informed that he was to be separated from employment under the Plan, he also received BST-CMRP-2A (listing Sutton and two other employees in JG64 as having been "selected for plan participation" and 18 other job guide 64 employees as "not selected for plan participation"); BST-CMRP-3 (notifying him: (a) that he was in a "work group affected by a competitive skills deficit," (b) that the Plan provided a "lump sum benefit" for employees who "terminate their employment with [BST] due to a competitive skills deficit," (c) that he had been "offered an opportunity to separate employment" under the Plan, (d) that he had "at least forty-five (45) calendar days in which to decide" whether he wished to participate in the Plan, (e) that he had been "advised to discuss this opportunity and the terms of . . . [the Plan] with an attorney, (f) that in order to accept the Plan offer, he would "be required to sign a [sic] the Plan Election and Release form (BST-CMRP-4A) (the"Release") and return it [to BST] . . . within one working day after the end of the forty-five (45) calendar day period, and (g) that, by agreeing to participate, Plaintiff was "being asked to ***waive all legal claims*** including claims under the Age Discrimination in Employment Act

of 1967, ***through the date of the Release)*** (emphasis added); and BST-CMRP-4, executed by Odom as the departmental officer (notifying him of his severance pay benefit under the Plan). True and Correct copies of forms BST CMRP-2A, 3, 4 and 4A are attached to this Amended Complaint as Attachments 3 a, b, c and d respectively.

37.

On June 8, 1995, Sutton filed a claim under the claims provisions set forth in the Plan asserting that his selection to participate in the Plan was contrary to the Plan's terms (the "Claim"). A true and correct copy of the Claim is attached to this Amended Complaint as Attachment 4. At the same time, because he had been given the deadline of July 7, 1995 to execute the Release, Sutton also filed a letter with defendant Dunn constituting a contingent "appeal" should the Claim be denied (the "Premature Appeal"). A true and correct copy of the Premature Appeal is attached to this Amended Complaint as Attachment 5. In both the Claim and the Premature Appeal (which were virtually identical), Sutton essentially raised the issues set forth in this Amended Complaint.

38.

On June 26, 1995, defendant Killian denied the Claim (the "Denial"). A true and correct copy of the Denial is attached to this Amended Complaint as Attachment 6. The Denial made three points:

A. MPEP did not identify Sutton "specifically as lacking competitive skills."

B. To qualify as a rater, a panelist "must have had ***approximately*** six months of significant exposure to the work of the manager to be rated, *e.g.*, as in a supervisory or other frequent contact relationship or approximately one year or more of general, work-related exposure. This exposure ***generally*** should have occurred within the past three years. Both Mr. Jacobs and Mrs. North reviewed these panel member criteria [the MPEP Guidelines] ***and felt that they did have the general work-related exposure necessary to rate you.***" (Emphasis added).

C. "The decision made by Charlie Coe and the four [Unit] officers to group all 21 JG64 managers into one universe was within the accepted parameters of the Force Management guidelines and thus, not a violation of policy or practice."

39.

At no point did Ms. Killian or any other defendant ever assert that the subject matter of Sutton's claim, *i.e.*, the flawed Plan selection process, was outside the purview of the Plan or the Plan claim procedures. By purporting to review the merits of Sutton's selection for participation in the Plan, defendants have conceded and acknowledged that the process of selecting employees for participation under the Plan is an integral part of the Plan subject to the applicable provisions of ERISA.

40.

By the Plan's terms, Sutton had the right to appeal the Denial "within 60 days after it [the Denial] is

received." Sutton received the Denial no earlier than June 26, 1995, and therefore had until at least August 25, 1995 to file his appeal. Nevertheless, because he had filed the Premature Appeal, he was informed that the Review Committee would review the Premature Appeal on June 30, 1995, only four days from the date of the Denial, even though Sutton had not seen the Denial when he filed the Premature Appeal.

41.

By June 30, 1995, after receiving the Denial, Sutton engaged legal counsel to assist him in appealing the Denial. On that date, Sutton's attorney contacted Keith Kochler ("Kochler"), an attorney representing BST and the Plan by telephone and requested and secured an agreement to postpone the review of the Premature Appeal until July 11, 1995. In addition Sutton's attorney requested the copies of the "Force Management guidelines" referred to in the Denial.

42.

By letter dated July 3, 1995, Kochler responded by agreeing to defer the appeal from June 30, 1995 to July 11, 1995. In addition, in response to Sutton's attorney's request for a copy of BSTs Force Management guidelines, Kochler responded, in pertinent part:

> During one of our conversations, you requested information concerning the guidelines used by the Company [BST] in determining the configuration of [Plan] universes. At the key manager level, the Company's overall philosophy is to

> draw such universes as broadly as possible. This philosophy is consistent with the Company's view that senior managers can and should be assessed on the basis of commonly held generalist skills versus specific subject matter expert competencies.
>
> Accordingly, key manager universes, which are drawn by pay grade, may include an entire Group President's organization, a Vice President's organization, or a combination of Vice Presidents' organizations where interchangeable competencies exist.
>
> The foregoing philosophy has been followed by the Company in its administration of other severance pay plans, such as the Career Transition Assistance Plan ("CTAP").

A true and correct copy of Kochler's July 3, 1995 letter is attached to this Amended Complaint as Attachment 7. Other than that response, BST never produced any "Force Management guidelines" to Sutton or his attorney. Also, contrary to the implication of the comments in Kochler's letter, four of the five Rated Skills at JG61 were identical to those rated for JG64. Further, on an actual case basis, there has been no more movement or interchangeability between organizations at the JG64 level historically than at the JG61 level where rating universes were established on a Unit basis.

43.

By letter dated July 6, 1995, Sutton's attorney pointed out to Kochler that the information he supplied in his July 3 letter did not appear to be the "Force Management

guidelines referred to on page 2 of the denial". He also asked Kochler for:

> any documents (*e.g.*, memoranda, E-mail communications, or correspondence, policy manuals, etc.) setting forth, describing, articulating, clarifing or interpreting guidelines for identifying "universes . . . within organizations that have been identified as having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive marketing intelligence," as described on page 3 of the Plan . . . and . . . any similar documents or procedures that relate to the selection of raters under the . . . MPEP, the "evaluation procedure selected by [BST]" as provided on page 3 of the Plan.

He further pointed out he did not know at that time whether he had all "pertinent documents" which bore on the substance of Sutton's appeal, and that he was inhibited and hampered in his ability to articulate Sutton's appeal. BST never produced any additional documents to Sutton or his attorney. A true and correct copy of Sutton's attorney's July 6 letter is attached to this Amended Complaint as Attachment 8.

44.

As alleged more particularly above, BST required Sutton to elect whether or not to participate in the Plan by July 7, 1995, by executing the Release. By its terms, the Release purported to release BST and related parties from "any and all claims of whatever nature, known or unknown" that Sutton "may have against [BST and

related parties] as a result of actions or omissions occurring through this date." This broad release language appeared to release even those claims encompassed in the Claim. In his July 6 letter to Kochler, Sutton's attorney protested the strict enforcement of the time limit of July 7, 1995 under the circumstances of the possible pendency of Sutton's appeal. In summary, he made the following points:

A. There was an inconsistency in the relation between the time limits set forth in the Claims Procedures set out in Pages 7-9 of the Plan, and the 45 day period given Plan participants to consider and seek legal advice regarding the offer of benefits under the Plan.

B. It was unfair and possibly in violation of ERISA to require a Plan beneficiary to release claims relating to application and administration of the Plan in order to receive Plan benefits.

C. If any of Sutton's claims was ultimately found to be meritorious, either by the Review Committee or upon review by a federal court under ERISA, Sutton would be entitled not to severance benefits under the Plan, but to back pay and reinstatement or front pay in lieu of reinstatement.

D. If, on the other hand, none of Sutton's pending claims were ultimately found meritorious, Sutton would be entitled to severance benefits under the Plan, because such a finding would establish he had been properly selected under the Plan to have the option of accepting those benefits.

E. Requiring Sutton to execute such a release by July 7 appears to require him to terminate prematurely his appeal rights under the Plan on a

Claim he has timely filed. This termination occurs before the 60 days given him by the Plan to consider whether to appeal, and certainly before his appeal can be given "full and fair" consideration by the Review Committee, subject to ultimate review under ERISA by a federal court.

F. The above actions unreasonably inhibit and hamper Sutton in the initiation and processing of his Claim.

G. By insisting Sutton execute the Release on July 7, 1995, or be terminated without benefits, BST and the Plan's administrators and fiduciaries are, in effect, discharging Sutton or discriminating against him in order to prevent him from exercising his right to have Claim and appeal fairly processed and his right to seek benefits under the Plan in violation of § 510 of ERISA, 29 U.S.C. § 1140.

45.

In response, by letter from Kochler dated July 7, 1995, the Plan refused to allow more time for Sutton to consider the wisdom of executing the Release. It insisted that Sutton execute the Release as drafted by July 7, while the Appeal had not finally been resolved. A copy of that letter is attached to this Amended Complaint as Attachment 9.

46.

In Kochler's July 7 letter, BST agreed that it would not "assert [Sutton's] execution of the Election and Release as

a bar to his pursuing an administrative appeal under the CMRP Plan." The Plan also agreed not to "assert [Sutton's] execution of the Election and Release as a bar to his filing a lawsuit under ERISA that is based on the claims that he presented to the CMRP Review Committee." BST, however, imposed the following condition:

> If your client does file an ERISA lawsuit, as a condition of filing such lawsuit, he agrees to pay the net CMRP [Plan] severance payment that he received into an escrow account that will be established under terms satisfactory to all parties. The payment will remain in this account pending the final disposition of your client's lawsuit. If the final disposition of that lawsuit is that there was no violation of ERISA, the severance payment and any interest accrued on that payment, will be returned to your client. If the final disposition of that lawsuit is that BST violated ERISA in its administration of the Plan, the severance payment, and any interest accrued on that payment, will be credited against any liability assessed against BST.

47.

Not wishing to jeopardize the benefits to which Sutton would be entitled under the Plan had he been properly selected, Sutton executed the Election and Release including the terms described in paragraph 43 as reflected in Attachment 10.

48.

In August 1995, Sutton was replaced by Jan Funderburg. In early 1995, Funderburg had been JG61 on North's staff. Later in 1995, she was promoted to a job

grade 62 or 63 and assigned to Coe's staff. To the best of Sutton's knowledge, Funderburg spent the last several years in a consumer (residential customer) staff assignment, while Sutton was playing a leadership role in the study of the small business market segment (FNS II), helping to formulate the company's competitive strategy for the Small Business Unit, and putting it into operation. Sutton has had far more experience than Funderburg in the collections part of the business, which makes up a large portion of Funderberg's current assignment, and has held roles with far greater responsibility and scope than Funderberg in BST's marketing organization. Funderberg was not subjected to the same rating process as Sutton, and was a protege of defendant North who, as noted above, improperly participated in Sutton's rating. Of the three JG64 individuals who were selected for participation in the Plan, only Sutton was replaced by someone already employed by BST, and who did not have "competitive skills" of the type described in the Plan that were demonstrably superior to those of the displaced BST employee.

49.

On August 25, 1995, Sutton filed his appeal of the Denial with the Review Committee raising the issues alleged in this Amended Complaint ("Appeal"). A true and correct copy of the Appeal is attached to this Amended Complaint as Attachment 11.

50.

On October 17, 1995, without giving Sutton an opportunity to be heard, or conducting a "full and fair review" as required by ERISA, the Review Committee denied the Appeal ("Appeal Denial"). In summary, it made four major points:

A. Sutton was properly included in the universe considered under the Plan because "Senior managers generally have been grouped into broader force management universes since they are considered to be generalists rather than specialists, and as such, to have skills that are interchangeable within a broader organization."

B. Jacobs and North were qualified to rate Sutton "based on a combination of their direct interaction with him, their knowledge of his work product, and/or their knowledge of his performance that was acquired through activities such as performance evaluation discussions that occurred within the organization."

C. There was no indication that Sutton's offer of separation was contrary to the provisions of the Plan.

D. Sutton's replacement by Funderberg was consistent with the Plan. The Customer Operation Group sought to create four vacancies (rather than three) because "shortly after application of BST CMRP [the Plan] to the universe, a fifth vacancy occurred due to the unanticipated loss of an additional manager from the universe, that was unrelated to the application of the plan. The managers who then remained in the universe were assigned to open positions; four of the five vacancies have been or are pending being filled

through competitive hiring, in accordance with the plan provisions; and the fifth position was filled at the discretion of the company, in this case through an internal promotion. Based on the availability of the fifth vacancy, and no plan provisions that would restrict either the designation or the method of filling that vacancy, there is no indication that backfilling Mr. Sutton's position with an internal promotion was contrary to the terms of the plan." A true and correct copy of the Appeal Denial is attached to this Amended Complaint as Attachment 12.

51.

As demonstrated herein, throughout the appeal process, defendants and their attorney purported to address the merits of Sutton's selection for participation under the Plan, further conceding and acknowledging that the selection process applied to Sutton is an integral part of the Plan, and therefore fully subject to the applicable provisions of ERISA.

52.

By letter dated October 27, 1995, hoping to avoid resort to litigation, Sutton protested the quality and result of the Appeal Denial to H.C. Henry, senior Human Resources executive of the BellSouth Corporation (BST's corporate parent). In it Sutton pointed out:

A. The three reasons given by the Review Committee for upholding Jacob's and North's decision to rate Sutton were demonstrably false because Sutton had minimal contact with Jacobs and North for over three years, and his performance as

rated by the only officer who could truly evaluate him was, in fact, superior.

B. The third reason was contrary to the MPEP Guidelines because those guidelines provided only for evaluations based on direct knowledge" . . . gained through a supervisory or other frequent contact relationship, or approximately twelve months or more of regular work-related-interaction."

C. Facts stated in the Appeal Denial were clearly and demonstrably erroneous.

A copy of that letter is attached to this Amended Complaint as Attachment 13. Sutton has received no written response to that letter.

53.

Sutton's wrongful termination in violation of and contrary to the terms of the Plan is particularly damaging to Sutton because his BST deferred compensation program contains non-compete provisions which provide that Sutton will forfeit all his rights to his deferred compensation, which he would otherwise receive at age 55, if he takes a competing job in the communications industry within the next ten years. Thus, Sutton will be unable to take another job in his industry without suffering the extreme penalty of loss of his deferred compensation and other vested incentives he earned during his career.

54.

As of the date of this Amended Complaint, Sutton has complied with the condition set forth in the Election

and Release, as modified by the July 7, 1995 letter agreement (Attachment 9), by paying the agreed amount of $79,265.00 into an escrow account established under terms agreed upon by all parties. A copy of the parties' Escrow Agreement is attached hereto as Attachment 15.

COUNT I

ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1): By Sutton as a "Plan Participant" to "Enforce His Rights under the Terms of the Plan" Against BST as Plan Sponsor and Administrator and the Plan.

55.

Plaintiff realleges the allegations contained in paragraphs 1-54 above and incorporates them as part of Count I.

56.

By the acts alleged above, BST and the Plan have violated the terms of the Plan and Sutton has been damaged thereby when BST improperly terminated his employment in violation of the Plan.

57.

WHEREFORE, Sutton requests that the Court grant the following relief:

1) Declare that BST and the Plan violated the stated purpose of the Plan by including Sutton in the JG64 universe rated under the Plan.

2) Declare that Sutton's ratings under the MPEP are invalid because only one of Sutton's raters was qualified under BST's MPEP Guidelines.

3) Declare that BST's and the Plan's use of MPEP as the evaluation procedure for the Plan violated ERISA and the Plan because the method of collecting MPEP's results precluded a full and fair review, if challenged under the claims procedures of the Plan required by § 503 of ERISA, 29 U.S.C. § 1133.

4) Declare that BST violated the stated purpose of the Plan by replacing Sutton with Jan Funderburg.

5) Order BST to reinstate Sutton to his former job with full back pay and allowances; or, if the court finds reinstatement not feasible,

6) Order BST to pay Sutton front pay based on his projected earnings at BST (including benefits and incentive programs provided by BST to managers at this level) until age 65 plus full back pay and allowances.

7) Award Sutton his attorneys' fees and costs of this action.

COUNT II

ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A): By Sutton as a "Plan Participant" to "Enjoin Any Act or Practice Which Violates Any Provision of this Subchapter or the Terms of the Plan" Against All Defendants.

58.

Plaintiff realleges the allegations contained in paragraphs 1-56, above and incorporates them as part of Count II.

59.

By the acts alleged above, each of the defendants have violated the terms of the Plan and ERISA, and Sutton has been damaged thereby.

60.

WHEREFORE, Sutton requests that the Court grant the following relief:

1. Enjoin the defendant, and all others acting in active concert with them, from administering or participating in administering the Plan by engaging in any of the following acts:

   a) Selecting or allowing to be selected any employee for termination under the Plan who is in a Plan universe within a BST organization that has been identified by such organization's departmental officer as not "having a critical skill deficiency

in areas such as understanding technology, market segment expertise, or competitive market intelligence."

b) Selecting or allowing to be selected any employee for termination under the Plan who has demonstrated he or she possesses Competitive Skills.

c) Selecting or allowing to be selected any employee for termination under the Plan for whom fewer than two raters qualify to rate such employee under the MPEP Guidelines.

d) Rating skills under the Plan not directly related to the Competitive Skills specifically addressed in the Plan.

e) Selecting or allowing to be selected any employee for termination under the Plan who has been rated under the Plan by any rater who did not qualify to rate such employee under the MPEP Guidelines by, among other things, not having, within three years prior to the date of the rating, either: (i) a minimum of six months of significant exposure to such employee's work as could be gained in a supervisory or other frequent contact relationship, or approximately twelve months or more of regular work related interaction or (ii) personally observed such employee in a work related relationship so that such rater is sufficiently knowledgeable to rate such employee on all competencies that have been selected for use in the MPEP.

f) Replacing any employee selected under the Plan with an employee who does not clearly and demonstrably possess Competitive Skills to a greater degree than such replaced employee.

g) Failing to document ratings under the Plan so they can be subject to full and fair review as required by ERISA.

h) Requiring repayment or waiver of the Plan severance benefit as a condition of any employee's pursuing the Plan Claims Procedure mandated by § 503 of ERISA to review the actions of the defendants in the administration of the Plan, and judicial review of such actions.

2. Awarding Sutton his attorneys' fees and costs of this action.

COUNT III

ERISA § 502(a)(3)(B)(i), 29 U.S.C. § 1132(a)(3)(B)(i): By Sutton as a "Plan Participant" to "Obtain Other Appropriate Equitable Relief to Redress [Count II] Violations" Against All Defendants for Preliminary Injunctive Relief, Expedited Discovery, and Other Relief.

61.

Plaintiff realleges the allegations contained in paragraphs 1-59, above and incorporates them as part of Count III.

62.

By the acts alleged above, each of the defendants have violated the terms of the Plan and ERISA, and Sutton has been damaged thereby.

63.

Sutton has demonstrated a substantial likelihood of success on the merits of this action.

64.

Sutton will suffer irreparable harm if his severance pay and benefits are not available for his use during the pendency of this action.

65.

BST will suffer no detriment equal to or greater than the harm that will be suffered by Sutton if preliminary injunctive relief is not granted.

66.

Sutton has no adequate remedy at law.

67.

WHEREFORE, Sutton requests that this Court order the following equitable relief:

1) Setting this matter down for hearing on a preliminary injunction at a date within 30 days from the date of this Order.

2) Order as expedited discovery the following:

   a) Requiring the defendants to produce the documents listed on Attachment 14 within 20 days of the date of this order.

   b) Requiring the defendants to answer written interrogatories within 20 days after service thereof.

3) Requiring BST, during the pendency of this action: (i) to reduce the initial amount of the escrow account established as described in paragraph 54 by immediate payment to Sutton of the following amounts: (a), a pro ration of his base salary from July 11, 1995 through the date of filing this suit and (b) $29,909.00, which is the amount Sutton has paid as attorneys' fees through the date of filing this suit; and (ii) to pay Sutton from any remainder in the escrow account, semi-monthly, his base salary benefit under the Plan. Such amount shall be credited against any back pay award which may be awarded Sutton, or against the Plan benefits due Sutton should Sutton not prevail in this suit.

4) Continuing all other benefits to Sutton under the Plan during the pendency of this action.

5) Awarding Sutton his attorneys' fees and the costs of this action.

6) Such other equitable relief as the Court in its discretion may deem appropriate.

This 15th day of January, 1997.

Respectfully submitted,

/s/ H. Lamar Mixson
H. Lamar Mixson
Ga. Bar No. 514012
Jill A. Pryor
Ga. Bar No. 589140

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. BARRY SUTTON, Plaintiff, vs. BELLSOUTH TELECOMMUNICATIONS, INC., BELLSOUTH TELECOMMUNICATIONS, INC. COMPETITIVE MANAGEMENT RESTAFFING PLAN, REBECCA DUNN, CHARLES B. COE, PHILLIP JACOBS, JULIA "JUDI" NORTH, JANE KILLIAN, and BST CMRP REVIEW COMMITTEE (R.C. MCLAUGHLIN AND JOHN AND JANE DOES NUMBERS AND IDENTITIES UNKNOWN), Defendants.	*	CIVIL ACTION FILE NO. 1:96-CV-1842

VERIFICATION

Before the undersigned officer duly authorized to administer oaths came D. Barry Sutton, who swears under oath that he has read and examined the foregoing **Amended Verified Complaint** and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ D. Barry Sutton
D. Barry Sutton

Sworn to and subscribed before me
this 15th day of January, 1997.

/s/ Sheryl A. Fuselier
Notary Public
My commission expires

Notary Public, Fulton County, Georgia.
My Commission Expires June 16, 1998.

ATTACHMENT 1

BELLSOUTH
TELECOMMUNICATIONS, INC.

COMPETITIVE MANAGEMENT
RESTAFFING PLAN

Effective May 1, 1995

BELLSOUTH TELECOMMUNICATIONS, INC.
COMPETITIVE MANAGEMENT RESTAFFING PLAN

PURPOSE

The BellSouth Telecommunications Inc. Competitive Management Restaffing Plan (BST CMRP) provides severance assistance to eligible management employees who are terminating employment with BellSouth Telecommunications, Inc. (BST) or any of its Participating Companies so that BST can hire individuals who possess critical skills that BST requires in order to compete in the telecommunications industry.

The term "Participating Company," as used in this Plan, shall refer to BST and any BST subsidiary that has determined to participate in this Plan. Addendum A contains a list of all companies participating in the Plan.

EFFECTIVE DATE

This Plan is effective May 1, 1995 through December 31, 1997. During this period, however, BST CMRP may be amended or terminated at any time (see "Plan Amendment and Termination").

ADMINISTRATION

At the request of the departmental officer within whose organization the deficit in competitive skills exists, the decision to utilize BST CMRP shall be approved by the BST Vice President responsible for Human Resources. Thereafter, the implementation and administration of the Plan are subject to the discretion of the BST Vice President with Human Resources responsibility, exercised in a manner consistent with the terms of the Plan. This includes determining for what periods of time the Plan will be in effect, approving and overseeing the implementation of the Plan, and authorizing all separations and all payments under the Plan.

ELIGIBILITY

You are eligible to participate in and receive benefits under the Plan if you meet *all* of the following criteria:

- At the time that you receive your BST CMRP offer, you are a regular full-time management employee, in a Job Grade 60 or above position, with a title other than Project Specialist and holding a position other than: an attorney (assigned to a Participating Company Legal Department), a physician (assigned to a Participating Company Human Resources Department), a pilot

(assigned to a Participating Company Corporate Aviation Organization), or a Senior Employee Assistance Manager or Employee Assistance Director holding an advanced degree (hereafter collectively referred to as "Professional Positions").

- You have at least twelve (12) months of Net Credited Service.

- You have, individually, or as part of a group, been designated by the BST Vice President responsible for Human Resources, in his or her sole discretion, as qualifying for participation in the Plan consistent with the standard described in the section entitled "Purpose."

- You irrevocably elect to and terminate employment with a Participating Company on or before the date specified by the Company in the particular BST CMRP offer.

- You execute a BST CMRP Election and Release form that will be provided to you by your Participating Company.

Special Eligibility Rules

Employees who satisfy all other Plan eligibility requirements and who are or have been on assignment with BellCore or another BellSouth company or on a leave of absence, which by its terms guarantees a right of reinstatement, and who are scheduled or expected to return to active service, and do return, as regular full-time management employees prior to the BST CMRP final separation date, will be included in a BST CMRP universe and may participate in the Plan.

Employees who have been on these assignments or leaves of absence for 24 months or more and have returned to the active payroll of the Participating Company for less that 12 consecutive months, with the approval of the BST Vice President responsible for Human Resources, may be excluded from participating in BST CMRP.

Exceptions to Eligibility

You will not be eligible to participate in this Plan if:

- After the acceptance of a BST CMRP offer, but prior to your termination, you should die.
- You separate from your Participating Company under the provisions of the BellSouth Telecommunication, Inc. Career Transition Assistance Plan (BST CTAP), the BellSouth Telecommunication, Inc. Employee Separation Assistance Plan (BST ESAP), the BellSouth Telecommunication, Inc. Discretionary Termination Allowance Plan (BST DTAP), the BellSouth Telecommunication, Inc. Career Alternative Plan (BST CAP), or any other management severance plan.
- You are terminated for misconduct or for any reason other than as a result of your participation in this Plan.

A BST CMRP offer made to an individual who does not satisfy the eligibility requirements of the Plan is null and void.

SEVERANCE PAYMENT REIMBURSEMENT

You will be required to reimburse 80% of the gross severance payment that you received under the Plan if within 90 days of your termination you perform contract or other consulting services (directly or through a third party vendor) for BellSouth Corporation, BST, or any of their subsidiaries or affiliates. This reimbursement penalty will not effect [sic] your ongoing entitlement to medical or other non-cash benefits that have been provided to you by virtue of your participation in the Plan nor will it effect [sic] the enforceability of the BST CMRP Election and Release.

RE-EMPLOYMENT

Individuals who terminate employment under BST CMRP may reapply for employment with BST or a subsidiary or affiliate; however, no priority or preferential employment rights will be extended to such applicants. Additionally, as a condition of such re-employment, other than re-employment under the Alternative Post-Retirement Employment Program ("APREP"), BST CMRP participants will be required to refund their BST CMRP severance payment to their Participating Company.

IDENTIFYING AND SELECTING BST CMRP PARTICIPANTS

BST CMRP universes will be approved within organizations that have been identified as having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive market intelligence. Such universes generally will be populated by a

group of five or more managers assigned to the organization.

Using an evaluation procedure selected by the Participating Company, the overall effectiveness of each manager in the group will be rated and ranked, from highest to lowest. The lowest ranked managers will be offered separation under the provisions of the Plan. The number of BST CMRP offers made will equal the number of vacancies that must be created so that the organization can hire individuals with the needed skills and expertise. Managers offered but declining separation under the provisions of the Plan will be terminated without benefits under the Plan.

Although BST CMRP offers generally will be made until the required number of job vacancies has been created, the BST Vice President responsible for Human Resources may suspend further use of the BST CMRP at any time and for any reason.

BST CMRP BENEFITS

1. Severance Pay

   If you are terminated under the provisions of BST CMRP, you will receive severance pay in an amount determined by the BST Vice President responsible for Human Resources. The BST Vice President responsible for Human Resources has sole discretion regarding the amount of severance pay, which will be based on the nature of the affected position and such other factors that he or she deems appropriate.

BST CMRP severance payments are subject to the appropriate withholding of federal, state, and local income taxes, social security (FICA), and Medicare taxes, and are reported on IRS Form W-2.

2. Group medical dental, vision and STAP coverage

If you separate under BST CMRP, your post-termination medical, dental, vision and STAP coverage depends on your pension status at the time of separation.

If you are service pension eligible under the BellSouth Personal Retirement Account Pension Plan at the time of separation, your Medical Assistance Plan (MAP) or Alternate Choice Plan, and Dental Assistance Plan (DAP) coverage will continue subject to the MAP or DAP provisions and limitations in effect on the date of your retirement, and any amendments thereafter made to these plans. In addition, if you are enrolled in the Supplemental Transplant Assistance Plan (STAP), you may continue coverage by paying the appropriate premium, subject to Plan provisions.

Vision Assistance Plan coverage will terminate at the end of the month in which you retire. You and your covered dependents are eligible to elect to continue vision coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) for a period not to exceed eighteen months from the date your coverage terminates. This coverage is available at a cost to you of 102% of the group rate. At the appropriate time, the Company will provide you with information on how to elect continued coverage under COBRA.

Rule of 65 Benefit Option: If, at the time of separation, you are not service pension eligible under the BellSouth Personal Retirement Account Pension Plan but you have at least ten (10) completed years of net credited service and the sum of your actual age and completed years of net credited service equals or exceeds sixty-five (65), i.e., you meet the Rule of 65, you may elect to pay your Participating Company a one-time payment of $1,000 for access to retiree MAP and DAP coverage, subject to the MAP and DAP provisions and limitations in effect on the date of your separation, and any amendments or modifications thereafter made to those plans and subject to the service-related medical premium and the medical premium associated with the capped amount. Only whole years of age (i.e., your actual full years of age as of your most recent birthday) and actual completed years of service are counted in determining eligibility under the Rule of 65. If eligible, you may elect this provision by so indicating on the BST CMRP Election and Release form. The BST Vice President responsible for Human Resources may amend or terminate the Rule of 65 Benefit Option in BST CMRP at any time. Unless terminated earlier, it will expire December 31, 1997.

Vision Assistance Plan and STAP coverage will terminate at the end of the month in which your employment terminates. You and your covered dependents are eligible to elect to continue vision and/or STAP coverage under COBRA for a period not to exceed eighteen months from the date your coverage terminates. These coverages are available at a cost to you

of 102% of the group rate. At the appropriate time, the Company will provide you with information on how to elect continued coverage under COBRA.

If, at the time of separation, you are not service pension eligible under the BellSouth Personal Retirement Account Pension Plan and are not eligible for or do not elect the Rule of 65 Benefit Option, your MAP or Alternate Choice Plan coverage will continue at Company expense, under the same conditions and to the same extent as a comparable employee on the active payroll, until you become eligible to elect to receive other group medical coverage with another employer, or for a maximum of six full months following the end of the month in which you terminate service, whichever comes first. If you are covered under an alternate choice program (HMO) any difference in premium, i.e., excess amount over what the company pays (out-of-pocket amount), will be billed to you directly.

Following this six month period, you and your covered dependents are eligible to elect to continue your MAP or Alternate Choice Plan coverage under COBRA for up to an additional twelve months by paying 102% of the group rate. The extended coverage cannot exceed eighteen months from the date your employment terminates. At the appropriate time, the Company will provide you with information on how to elect coverage under COBRA.

If you do not elect to pay the premiums under COBRA, medical coverage will terminate at the end of the sixth full month after the date of separation.

Dental Assistance Plan, Vision Assistance Plan, and STAP coverage will terminate at the end of the month in which your employment terminates. You and your covered dependents are eligible to elect to continue dental, vision, and/or STAP coverage under COBRA for a period not to exceed eighteen months from the date your coverage terminates. These coverages are available at a cost to you of 102% of the group rate. At the appropriate time, the Company will provide you with information on how to elect continued coverage under COBRA.

RELEASE

As a condition to participating in BST CMRP, you are required to sign a release waiving your right to pursue any claim action, or proceeding against BST, its parent, affiliated or subsidiary companies or entities. A sample of the Election and Release form is attached as Addendum B, and the terms of the Election and Release are incorporated as part of the Plan.

FINANCING OF BST CMRP COSTS

Separation costs under BST CMRP are paid from the general assets of the Participating Company and are charged as an appropriate departmental expense as designated by the Company.

The Participating Company also pays the cost of up to six months of continued MAP or Alternate Choice Plan coverage under the terms previously described.

TYPE OF PLAN

The Plan is classified as a welfare benefit plan under provisions of the Employee Retirement Income Security Act (ERISA) of 1974.

PLAN ADMINISTRATION

BellSouth Telecommunication, Inc. is the BST CMRP Sponsor and Administrator. BST has delegated Plan administrative responsibilities as follows:

- BST has delegated to its Vice President responsible for Human Resources the overall fiduciary responsibility for administering BST CMRP on behalf of BST and the Participating Companies and for making determinations, consistent with the terms of the Plan, concerning when and to which individuals or groups BST CMRP will be offered.
- BST has delegated to the applicable BST CMRP Headquarters Coordinator, the fiduciary responsibility to review, and to grant or deny claims that are filed under the Plan.
- BST has delegated to the BST CMRP Review Committee the fiduciary responsibility of affording a full and fair review of all appeals resulting from denied claims or any other dispute arising out of the interpretation or administration of the Plan.
- BST has delegated responsibility for handling BST CMRP administrative services for eligible participants of BST and its Participating Companies to:

For BST participants:

BellSouth Telecommunication, Inc.

BST CMRP Coordinator
South E711
3535 Colonnade Parkway
Birmingham, Alabama 35243
Telephone (205) 977-8164

For BellSouth Business Systems Holdings, Inc. participants:

BellSouth Business Systems, Inc.
BellSouth Communication Systems *(Only for management employees eligible to participate in the Personal Retirement Account Pension Plan or any successor pension plan)*
BellSouth Financial Services Corporation
BST CMRP Coordinator
Suite 1225
3000 Riverchase Galleria
Birmingham, Alabama 35244
Telephone (205) 985-1808

CLAIM AND APPEAL PROCEDURE

A. *Claim Procedure:* Plan participants, or any person duly authorized by a participant, may file a claim in writing in order to secure benefits under the Plan, or to secure a review of any other matter related to the Plan if they believe they have been treated unfairly with respect to the Plan. A written claim must be sent to the applicable BST CMRP Coordinator listed above within 60 days of the date of the alleged unfair treatment, or occurrence of other facts giving rise to the claim.

If the claim is denied, the claimant will receive written notice of the BST CMRP Coordinator's decision, including the specific reason(s) or, the Plan provisions that support the decision, within 90 days of the date that the claim was received. In some cases, more than 90 days maybe [sic] needed to make a decision. In such cases, the claimant will be notified (in writing within the initial 90-day period) of the reason more time is needed. An additional 90 days may be taken to make the decision if the claimant is sent such a notice. The extension notice will show the date by which a decision will be sent.

B. *Appeal Procedure:* The appeals procedure which follows provides the rules for appealing a denied claim.

A claimant may use this procedure if:

1. No reply at all is received by the claimant within 90 days after filing the claim (in which case the claim is deemed as being denied); or

2. In cases where a notice has extended the time for an additional 90 days and no reply is received within 180 days after filing the claim (in which case the claim is deemed as having been denied); or

3. Written denial of the claim for benefits or other matters is received within the proper time limit and the claimant wishes to appeal the written denial.

If a claim for benefits or review of any other matter related to the Plan is denied, the participant, or another duly authorized person, may appeal this denial in writing within 60 days after it is received, or if no decision is received, within

60 days of the date it is deemed to have been denied. A written request for review of any denied claim should be sent directly to your participating company's BST CMRP Coordinator, who will then refer it to your participating company's BST CMRP Review Committee.

Unless the BST CMRP Review Committee sends notice in writing that the claim is a special case requiring more time, the Committee must conduct a review and resolve the appeal of the denied claim within 60 days after receipt of the written request for review. In special cases, when more time is needed to make a decision, the BST CMRP Review Committee will send notice in writing that there will be a delay and give the reason(s) for the delay. In such cases, the BST CMRP Review Committee may have 60 days more, or a total of 120 days, to make its decision.

If the claimant, or another individual designated by the claimant to represent him/her, submits a written request for review of the denied claim, such person has the right to:

1. Review pertinent Plan documents which may be obtained by following the procedures described in "Plan Documents."

2. Submit to the BST CMRP Review Committee a written statement of the issues and any other documents in support of the request for BST CMRP benefits or any other matter under review

The BST CMRP Review Committee's decision shall be given to the claimant in writing within 60 days, or if extended, 120 days, and shall include the specific reason(s) or, the Plan provisions that support the decision. If the BST CMRP

Review Committee does not give its decision on review within the appropriate time span, the claimant may consider the claim denied.

The BST CMRP Review Committee has been delegated the sole and complete discretionary authority to resolve benefit claim appeals under BST CMRP and to interpret and enforce the provisions of the Plan. Its determinations and interpretations of the Plan are final and are not subject to further administrative review.

LEGAL SERVICE

Process can be served on the Plan Administrator by directing such service to the appropriate company BST CMRP Coordinator at the address shown in the Plan Administration section, above.

PLAN RECORDS

The BST Competitive Management Restaffing Plan and all related records are kept on a calendar year basis – beginning January 1 and ending December 31 of each year.

PLAN IDENTIFICATION NUMBERS

This Plan is identified by the following numbers under Internal Revenue Service (IRS) rules:

58-0436120 assigned by the IRS
575 assigned by BellSouth

PLAN AMENDMENT AND TERMINATION

BST and the participating companies reserve the right to amend or terminate the Plan at any time with or without notice and without consent of employees or Plan participants. Amendment or termination of the Plan is effective upon execution of a written amendment or termination statement by the BST Officer responsible for Human Resources.

PLAN DOCUMENTS

This docent [sic] is intended to serve as both the full text of the BST Competitive Management Restaffing Plan as well as a Summary Plan Description of such Plan. BST CMRP participants are entitled to examine, without charge, various Plan documents, including documents and reports that are maintained by the Plan and/or filed with a federal government agency. These documents are available for review at your Company Plan Coordinator's office. If a participant is unable to examine the documents at such a location, he/she should write the Company Plan Coordinator, specifying the documents to be examined and at which work location the participant wishes to examined [sic] them. Copies of such documents will be made available for examination at that work location within 10 days of the date the request was made.

At any time, participants may request copies of any Plan documents by writing to the Plan Coordinator at the address shown in the Plan Administration section above. Participants will be charged a reasonable fee for copies of the documents requested.

RIGHTS OF A PLAN PARTICIPANT

As a participant in the BST Competitive Management Restaffing Plan, you have certain rights under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all Plan participants shall be entitled to:

- examine, without charge, all Plan documents and copies of all documents filed by the Plan within the U.S. Department of Labor, if any; and

- obtain copies of all Plan documents and other Plan information upon written request to the Company Plan Administrator as described above.

In addition to creating rights for Plan participants, ERISA imposes duties upon those who are responsible or the operation of employee benefit plans. The people who operate your Plan, called "fiduciaries" of the Plan, have a duty to do so in accordance with the Plan's terms and in the interest of you and other Plan participants. No one, including your employer, or any other person, may terminate your employment or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA. If your claim for benefits is denied, in whole or in part, you have certain rights of review as described in this document under "Claim and Appeals Procedure."

Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from your Plan Coordinator and do not receive them within 30 days, you may file a lawsuit in a federal court. In such

case, the court may require the Company Plan Coordinator to provide the materials and pay up to $100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the Plan Coordinator. If you have a claim for benefits that is denied or ignored, in whole or in part, you may file a lawsuit in state or federal court. If you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file a lawsuit in a federal court. The court will decide who will pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees.

If you have any questions about the Plan, you should contact the Company Plan Administrator. If you have any questions about this statement of your rights, or about your rights under ERISA, you should contact your nearest Area Office of the U.S. Labor Management Services Administration, Department of Labor.

ADDENDUM A

The following companies are participating in this Plan:

BellSouth Telecommunications, Inc.

BellSouth Business Systems Holdings, Inc.

BellSouth Business Systems, Inc.

BellSouth Communication Systems (*Only for management employees eligible to participate in the Personal Retirement Account Pension Plan or any successor pension plan*)

BellSouth Financial Services Corporation

AND OTHER COMPANIES AS APPROVED BY THE BELLSOUTH TELECOMMUNICATIONS, INC. OFFICER RESPONSIBLE FOR HUMAN RESOURCES.

ATTACHMENT 2

MANAGEMENT PANEL EVALUATION PROCESS GUIDELINES FOR THE SELECTION OF PANELISTS

Departments are responsible for identifying appropriate raters for each panel, for ensuring the raters meet the panelists selection criteria, for ensuring they fully understand their responsibilities under the process, and for obtaining their concurrence to participate in the process. There should be a minimum of two (preferably three) and a maximum of five raters for each individual being rated.

The following guidelines for the selection of panelists have been established to ensure the fairness of the process for the individuals being rated:

WORKING RELATIONSHIP:

The following individuals from within the department are appropriate raters for an individual provided they meet the other panelist selection criteria:

Current Supervisor	Former Supervisor
Current Supervisor's Supervisor (i.e. boss' boss of the ratee)	Former Supervisor's Supervisor (i.e. former boss' boss of the ratee)

Peers of the ratee's current supervisor or current boss' boss within the department.

If insufficient raters can be identified within the department to rate an individual, former supervisors (boss or boss' boss) who have left the department for no more than approximately twelve months, or former supervisors (boss or boss' boss) who have left the payroll for no more than approximately six months, may be utilized. During the panel session, these raters may rate only managers who they have supervised.

KNOWLEDGE OF RATEES:

Raters must be sufficiently knowledgeable such that they can evaluate the ratees that they are to rate on all five competencies that have been selected by the department for use in the process.

LENGTH OF WORK EXPOSURE:

A minimum of six months of significant exposure, as could be gained through a supervisory or other frequent contact relationship, or approximately twelve months or more of regular work-related interaction.

TIME FRAME FOR WORK EXPOSURE:

Supervisory or other work-related exposure to the work of a individual should have been within the past three years.

JOB GRADE:

Raters must be at least one permanent job grade higher that [sic] the individuals they will be rating.

ATTACHMENT 3

BellSouth Telecommunications, Inc.
Competitive Management Restaffing Plan
(BST CMRP)
Identification of Individuals Selected and Not Selected For Participation

Company: BST

Work Group (Function): Customer Operations

Department: Customer Operations

Location: Regional

Job Grade: 64

INDIVIDUALS SELECTED FOR PLAN PARTICIPATION

	JOB TITLE	AGE
1)	Sales Vice President	55
2)	Assistant Vice President	47
3)	Sales Vice President	47

* * *

INDIVIDUALS NOT SELECTED FOR PLAN PARTICIPATION

	JOB TITLE	AGE
1)	Assistant Vice President	52
2)	Executive Director	47
3)	Assistant Vice President	47
4)	Sales Vice President	50
5)	Executive Director	51
6)	Executive Director	46
7)	Sales Vice President	52
8)	Assistant Vice President	45
9)	Executive Director	46
10)	Assistant Vice President	51

11) Sales Vice President	51
12) Executive Director	37
13) Sales Vice President	47
14) Executive Director	36
15) Sales Vice President	36
16) Executive Director	50
1) General Manager	38
2) Assistant Vice President	37

Note: List the job titles and ages of all individuals in the universe who are selected for participation in this plan and the job titles and ages of all individuals who are not selected for participation in this plan in the appropriate columns above

Attach additional sheets as necessary

(5-95)
BST CMRP-3

BellSouth Telecommunications, Inc.
Competitive Management Restaffing Plan
(BST CMRP)
Document Receipt Acknowledgement

I acknowledge that on May 22, 1995, I received a copy of the BST Competitive Management Restaffing Plan ("BST CMRP" or the "Plan"), which also serves as the summary plan description; a completed BST CMRP Notification of Severance Pay Amount (BST CMRP-4); Identification of Individuals Selected and Not Selected for Participation (BST CMRP-2A); and a BST CMRP Election and Release form (BST CMRP-4A).

Based upon the information provided in the foregoing documents and by my Company, I understand that:

1) I am in a work group affected by a competitive skills deficit.

2) BST CMRP provides a lump sum payment to employees who terminate their employment with BellSouth Telecommunications, Inc., or any Participating Company due to a competitive skills deficit. The manner in which the payment is calculated is explained in the Plan on page 3.

3) I have been offered an opportunity to separate employment under BST CMRP.

4) I have at least forty-five (45) calendar days in which to decide whether I want to participate in BST CMRP. During this time period, and prior to submitting the Election and Release form (BST CMRP-4A), I was advised to discuss this opportunity and the terms of BST CMRP with an attorney.

5) In order to accept my Company's BST CMRP offer I will be required to sign a BST CMRP Election and Release form (BST CMRP-4A) and return it to the BST CMRP Coordinator in Human Resources within one working day after the end of the forty-five (45) calendar day period. If I want to decline the offer of BST CMRP, I must check the appropriate block on the reverse of the Election and Release form (BST CMRP-4A), sign and date the form and return that document to the BST CMRP Coordinator in Human Resources within one working day after the end of the forty five (45) calendar day period. In signing the BST CMRP Election and Release form (BST CMRP-4A), and agreeing to participate in the Plan, I am being asked to waive all legal claims, including claims under the Age Discrimination in Employment Act of 1967, through the date of the Release.

6) Participation in BST CMRP is entirely voluntary.

/s/ D.B. Sutton
Signature

/s/ D.B. Sutton
Name (Please Print)

261-80-7812
Social Security Number

May 22, 1995
Date

BellSouth Telecommunications, Inc.
Competitive Management Restaffing Plan
(BST CMRP)
Notification of Severance Pay Amount
PRIVATE

Company BST

Name D. B. Sutton

Social Security Number 261-80-7812

Title Assistant Vice President

Department Customer Operations

Job Grade 64

NCS Date 1-10-72

Current Annual Base Salary 133,100

Location Atlanta, GA

Offer Date 5-22-95

Submission Deadline 7-7-95

Preliminary Computations of
BST CMRP Separation Payment

The gross amount of severance payment made under the provisions of BST CMRP will be indicated on line (c).

(a)	Annual Base Salary	$133,100•
(b)	Multiplying Factor	150 %
(c)	(a) X (b) Total Separation Payment	$199,650 #

The final separation date (last day on active payroll) will 07/11/95
MM/DD/YY

• Annual base salary (which does not include lump sum incentive awards) is the annual base salary rate in effect as of the date of separation, excluding differentials, overtime, carfare, value of meals and certain other types of special allowances.

Applicable taxes will be withheld from the amount shown.

If, at the time of separation, you are not service pension eligible under the BellSouth Personal Retirement Account Pension Plan but you have at least ten (10) completed years of service and the sum of your actual age and completed years of service equals or exceeds sixty-five (65), i.e. you meet the Rule of 65, you may elect to pay your Participating Company a one-time payment of $1,000 from you [sic] net severance payment for access to retiree MAP and DAP coverage.

Recommended (Department Officer)

/s/ Rod Odom

Title

V.P. Small Business

Date

Approved (BST Vice President-Human Resources)

Date

Univ. No.

(5-95)
BST CMRP-4
Reverse

Instructions For Preparation and Use of BST CMRP-4

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1. Human Resources shall prepare Form BST CMRP-4 for each individual to be offered participation in BST CMRP.

2. The top portion of the BST CMRP-4 shall be completed with the requested information. The date the discussion is held with the employee(s) shall be entered as the offer date. The Submission Deadline shall be at least 45 days from the date of offer.

3. The remaining sections of the BST CMRP-4 shall be completed to reflect the calculation and amount of the BST CMRP payment.

4. During the discussion the employee shall be given a copy of the BST CMRP-4.

CMRP SEPARATION INFORMATION

–Separation Pay will be 150% of annual base salary and is subject to federal, state, FICA and Medicare withholdings and will be reported on IRS form W-2.

–Option to receive pension as a lump sum for those who are service pension eligible or vested.

–TEAM award amounts will be based on the number of months an employee completes during the calendar year.

–Relocation assistance up to $10,000 if eligible

–If you have at least 10 years of service, Rule of 65 is defined as any combination of age in whole years and completed years of service that total at least 65. Rule of 65 applies to SERP.

–Treatment of Benefits

Medical/Dental Coverage – If you are service pension eligible, you will pay only a monthly rate based on increase in coverage costs. If you meet rule of 65 and have at least 10 years service, you may make a one time payment of $1000 and participate in Medical and Dental coverage. Additionally, you would pay the monthly rate and a monthly premium rate.

–Individual Counseling and Job Search support services provided by InterChange and will be available as early as Monday.

–Transitional Leave option is available if you are within two years of being pension eligible. A Transition Leave may be up to 24 months.

KEY MANAGER BENEFITS
(specific questions may be referred to Diane Woodall 529-6106)

PLAN	Service Pension Eligible Under SERP	Not Service Pension Eligible Under SERP
NQDIP	Deferral payout in amounts at enhanced interest rates and on date specified in the agreement.	Deferrals recalculated at 10 year U.S. Treasury rate and paid in a lump sum. NOTE: If separated under an approved plan, the individual will be treated as service pension eligible for this benefit only.
SERP	Payable as an immediate Pension. Eligible for death benefit.	Payable as a deferred vested pension at age 65. Not eligible for death benefit.
MPP	Payable as an immediate	Payable as a deferred vested pension at age 65.
PRA	Pension only if service pension eligible for BSMPP/ PRA. Eligible for Death Benefit only if service pension eligible for BSMPP/ PRA.	Not eligible for Death Benefits.

SOP	All options immediately vested and are exercisable as described on the attached.	All outstanding options are canceled at separation.
Life Ins.	Continues in accordance with plan.	Must buy out company's interest or lose it.
FSP	Receives post retirement services under plan.	Receives no benefit following separation.
SRCP	All outstanding grants will payout on schedule.	All outstanding grants will be canceled.
ROTOC*	All outstanding grants will payout on schedule.	All outstanding grants will be canceled.

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* Plan available to senior managers who have ever been assigned to BSE.

PRIVATE

June 6, 1995

Ms. Rebecca Dunn
Vice President – Human Resources
Birmingham, Alabama

Dear Ms. Dunn:

As you know, I have been identified through the CMRP process as allegedly lacking the competitive skills required by the Company going forward, and have been offered a separation agreement under this Plan to leave the Company by July 11, 1995.

I am aware of the provisions under the Plan for claims and appeals, but I find the time the Company allows itself for responding to these activities to be excessive and not predictable with respect to the prospect of producing a timely answer within the much shorter time a person in my position has been given under the Plan. Under these circumstances, I have decided to appeal directly to you in the hopes that the Company and I can reach a mutually agreeable solution in a more reasonable time frame.

It is, in short, my contention that the Company failed to execute the announced terms of the CMRP in the selection of my raters. Two of the three raters simply did not have sufficient work related exposure to me that was recent enough to allow them to either elect to rate me or to rate me in the manner prescribed by the various procedures established for the Panel process. I'm quite certain that an objective review of the facts in this regard will bear this out and many of these facts are presented for you in the attachments which accompany this appeal.

At this point, whether the Company and its involved Officers have chosen to eliminate me because of a personal dislike, because of my physical difficulties (a recent hospitalization due to a bleeding ulcer), because of my past "whistle blowing" action against a "favored" executive, or for long past real or imagined transgressions, the fact is they have participated inappropriately as raters in this Plan. And, for the moment, I am less concerned about their motives than I am about achieving a resolution that is sufficiently improved over that which is currently offered. One that will allow me to move on.

I believe it is possible to do this in a way that will allow both the Company and me to achieve our desired objectives. I am certainly aware, however, that the Company will wish to avoid any appearance of flaw in its CMRP and Panel processes and that a settlement for anyone different from the standard one offered under that Plan might be construed as such. For that reason and others, I have offered what I believe to be valid rationale which could be used to establish why I should not be or have been included under that Plan per se. That rationale is enclosed as attachment A.

Despite my conviction that I was improperly targeted and judged in this process, I have no desire to remain with a Company so determined to be rid of me that its Officers would resort to improper involvement in a process they assured everyone was designed, and would be executed, with good intent. I have, though, been grievously harmed by their involvement and bogus ratings and believe the Company would be compelled in other, more public forums, to compensate me for that. We can spare one another a great deal of time, distraction and expense by

resolving this matter more appropriately than is currently suggested. The basis upon which your decision should be based is set forth in more detail in Attachment B.

Finally, to show even more dramatically the error of the Panel's recommendation, I enclose as attachment "C", the final results of the Company's annual "Upward Feedback" analysis. While not dispositive of the issue of my skills, this report clearly shows my management skills of the type measured in the rating process are excellent. Certainly from the perspective of my direct reports who best know my true actions and behaviors. Rod Odom also believes and has stated that I have the appropriate competitive skills. The Company simply erred in the implementation of this Plan as it relates to me.

As information, I am also filing a claim/appeal under the Plan in an effort to allow the Company to cure its violation of the Plan, redefine the relevant universe and remove me from any identified surplus. That claim/appeal would be dismissed upon our resolving the issues related to my proposed separation from BST.

I urge you and any others considering this appeal to think beyond the initial impulse to blindly fight any attack on the Plan in order to justify it. Instead, see it for what it is – a problem of execution that can be remedied and avoided in the future with just a few rather minor modifications to the rater selection portion of the process. Ones you must make, quite frankly, if you want to avoid unnecessary difficulty going forward. I'd be happy to share my ideas in this regard if you'd like. Ideas that I know would improve this process.

I will look forward to hearing from you in the immediate future as I must make a number of decisions over the next few weeks, contingent upon your response. I am prepared to discuss proposed terms and conditions at your convenience. I can be reached through my voice mail at (404) 330-0690 or at 396-3396. Thank you for your consideration.

Sincerely,

/s/ D. B. Sutton
D. B. Sutton

Attachments

cc: Walter Alford, Esq.
H. C. Henry, Jr.
Keith Kochler, Esq.

ATTACHMENT A

RATIONALE FOR POSITION AS TO WHY I WAS IMPROPERLY INCLUDED IN THE CMRP FORCE MANAGEMENT PLAN

The decision to include me in the CMRP universe was arbitrary, capricious and improper. Furthermore, the Company has manipulated this Plan with respect to me in order to provide Officers with the opportunity to eliminate me without respect to my actual skills, behavior or performance against those dimensions chosen for evaluation.

- The Officer of the organization I was in (Rod Odom) did not declare a competitive skills deficit in his unit at the Department Head level (p.g. 64).

He did, however, declare the greatest percentage surplus at the p.g. 61 universe of any of the COUs. The latter speaks to his relative "toughness" at making a hard decision as to the presence of competitive skill gaps.

- There was a sufficient number of individuals at p.g. 64 to construct a universe of adequate size as set forth in the CMRP by either combining those Customer Operations Units where a Competitive Skills deficit was declared at this manager level, or by forming individual universes specifically where such declarations were made as was done with all other paygrades in the COUs.

- Constructing a universe in either fashion indicated above would have insured that individuals from any non-surplus unit would not have been rated and potentially terminated inappropriately by individuals (raters) who were either not sufficiently familiar with their actual performance in the selected dimensions, or who were willing to abuse this process to eliminate individuals for personal, rather than performance reasons. Building universes in this manner would have further insured that any actual force elimination would have occurred from those units where a competitive skills deficit was acknowledged and declared in the best interest of both the Company and the individuals involved.

- All universes other than p.g. 64 *were* constructed on a specific work group or business unit basis.

- Other specific universes in the organization were established on a work group basis and not subjected to the "Panel" process when no surplus was declared at their level within their unit.

Examples: IPOS-AIN 3 p.g. 61s / 0 surplus

IPOS-Support 3 p.g. 61s / 0 surplus

Oper. Svcs. 7 p.g. 62s / 0 surplus

- Other universes consisting of as few as 3 individuals *were* constructed where a surplus was declared and identified to an individual through the Panel rating process.

  Example: Public Comm. 3 p.g. 61s / 1 surplus

  This speaks further to the fact that p.g. 64 universes should have been constructed on the basis of declared surpluses consistent with other paygrades as *no* Officer work group consisting of less than 3 p.g. 64s exists.

- Had the universe of p.g. 64s been constructed as it was with all other manager levels I wouldn't have been in a universe to be rated nor subjected to being rated by individuals not qualified to serve as raters under their terms of the Plan.

ATTACHMENT B

The Company cannot and has not fairly or adequately demonstrated that I lack the skills necessary to perform effectively in a competitive environment. Furthermore, it has allowed 2 individuals (of 3) to rate me in violation of both the written and stated terms of the plan with regard to rater qualifications. It is my contention that these individuals, Judi North and Phil Jacobs, improperly participated in this process with full awareness that they did not qualify under the terms of the Plan, and that they executed their ratings in a prejudicial manner.

- The Plan specifically states that rankings will be based on performance and that each individual rated will have between 2 and 5 raters who are familiar with this individual's work.
- The Plan further stipulates that raters must be able to rate the individual in question in each of the 5 competency areas chosen and must have at least six months of **significant exposure** or one year of general exposure to the work of the people they are rating.
- During the Charlie Coe led coverage of the CMRP to the District level and above managers of the Customer Operation Units on May 1, 1995, Sam Rasor, the Human Resources Department Head, covered the specifics of the Plan and responded to questions. When asked (by me) in the full group setting, how far back one should go in considering whether their knowledge of work and performance was recent enough for them to serve as a rater, Mr. Rasor replied, "Generally, about 6 months, maybe a little longer, but you wouldn't want to go back more than a year."
- Every COU Officer was in this meeting. Charlie Coe was at the front of the room with Rasor. My ultimate raters, Odom and Jacobs, were in the front row of the audience, and Judi North was 5 to 6 rows back (even with me). Each of these Officers heard the question and the answer. It was either the only question or the first of two asked at this particular juncture when the floor was first opened to questions. No one, including these Officers, took exception to this statement by Rasor nor did they offer any comment or clarification then, or at any time subsequent to this meeting.
- While the Company may contend that it has no obligation in a "Free Employment" state to offer

any particular force management plan to accomplish its downsizing or outplacement goals, when it does formulate and promulgate such a Plan, it has, and acknowledges, its legal responsibility to operate the plan in accordance with its terms and in the interest of the Plan participants. It is reasonable to assume that BST's Human Resource Department Head's unchallenged position relative to rater qualifications would be construed as terms the raters – particularly Officer raters – would abide by.

- Neither North nor Jacobs, knowing the letter and spirit of the Plan with respect to rater qualifications, as well as the requirement to sufficiently know my actual performance to the extent necessary to rate me in 5 separate skill dimensions, should have rated me.

- Dick Anderson is another COU Officer whose personal exposure to my performance, while neither recent or extensive, is substantially more recent than North's. It is also far more extensive, and as recent as Jacobs, yet he declined to rate me as he recognized he did not have adequate recent exposure or knowledge of my performance to serve as a rater. Given Dick's bias for action in situations such as these, I suggest this is very telling.

- Various materials were provided to raters prior to the rating session itself; including information on the dimensions, or competencies to be rated, the behaviors which reflect the required skills and abilities and the opportunities to observe them demonstrated. A cursory review of these materials, along with the information they had received relative to rater qualifications, would have made it abundantly clear to both North and

Jacobs that they could not objectively and personally judge my current performance as the Plan intended. Especially given the substantial passage of time – 3 to 4 years – since our period of actual interaction or business contact.

- Once in the actual rating sessions, the Panel process introduction delivered by Human Resources personnel includes instruction, performance statements and exercises which would have again highlighted their unsuitability as raters under the Plan. This information was either not delivered as prescribed or it was ignored.

- Except for large conferences or meetings of a general nature, such as Senior Manager Conferences, I have not been in so much as a single business meeting with either Jacobs or North in over 2 years. Prior to that time and going back to May of 1992, I have only been in a single interactive business meeting with each one. Neither has been exposed to me or my work in any direct manner for over 3 years that would provide either of them with the first hand knowledge they would need to rate my performance in any, much less all, of the dimensions selected for this p.g. 64 universe.

- Since Jacob's appointment to Officer, I have had virtually no contact with him whatsoever. We were peers in the same organization for a fairly short period of time between 1991 and May of 1992 when I left Premises Marketing and moved to the Small Business FNS Project.

- With respect to Judi North, I last worked with her in early 1991. Prior to that time and back to March of 1989, I reported to her through Hal Davis. Virtually all of my contact with North was direct and it occurred on a daily basis for the most part during this time. She assigned my performance

ratings during this period and discussed my appraisals, ratings and salary treatments.

- While working with North I was given top ratings and Individual Incentive Awards (IIAs) which I was told were as high as any she was awarding during this period. Whenever I sought counseling or advice as to what I could or should do differently to enhance my performance, both real and perceived, she invariably told me that I should just keep doing what I was doing.

ATTACHMENT 5

June 8, 1995

BST CMRP Coordinator
South E711
3535 Colonnade Parkway
Birmingham, Alabama 35243

To whom it may concern:

I have been identified through the CMRP process as allegedly lacking the competitive skills required by the Company and have been offered a separation agreement under this Plan to leave the Company by July 11, 1995.

While I find the time the Company allows itself within the Plan for responding to claims and appeals to be excessive and out of synch [sic] with respect to the much shorter time a person in my position has been given under the Plan, I hereby file this claim to secure a review of all matters pertaining to the Plan's application to me

with regard to the selection of my raters and the establishment of the p.g. 64 universe.

It is my contention that the Company failed to execute the announced terms of the CMRP in the selection of my raters. Two of my three raters did not have work related exposure to me that was recent enough to allow them to either elect to rate me or to rate me in the manner prescribed by the various procedures established for the Panel process.

It is also my contention that the CMRP p.g. 64 universe was improperly established inasmuch as its composition included individuals from the Company's Small Business organization where no deficiency of competitive skills was actually declared by the Vice President. This approach was unlike that used with all other manager paygrades within the COU and is in direct conflict with the first sentence under the heading:

IDENTIFYING AND SELECTING BST CMRP PARTICIPANTS which is found on page 3 of the BST Competitive Management Restaffing Plan and states:

> "BST CMRP universes will be approved within organizations that have been identified as having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive market intelligence."

Inasmuch as there were no deficiencies declared at my paygrade within the functionally distinct Small Business organization, the Company's decision to include me in this universe was arbitrary, capricious and improper and was manipulated to provide certain of its Officers with the opportunity to eliminate me without regard to my

actual skills, behavior or performances against those areas of competency chosen for evaluation and without regard to the provisions of the Plan relative to rater qualifications. An objective review of the facts in this matter will bear out each of these contentions. Many of these facts are presented for you in the attachments which accompany this claim.

My rationale as to the improper construct of the paygrade 64 universe beyond the Plan's own definition already mentioned, is enclosed as attachment A. The basis upon which your decision should be based relative to my claim that two-thirds of my raters were not qualified under the announced and published terms of the Plan is set forth in more detail in Attachment B.

Whether the Company and its involved Officers have chosen to eliminate me because of a personal dislike, because of my physical difficulties (a recent hospitalization due to a bleeding ulcer), because of my past "whistle blowing" action against a "favored" executive, or for long past real or imagined transgressions, the fact is that 2 of the 3 Officers involved are completely lacking with respect to timely exposure to either my performance or my skills and behaviors over the past three to four years and, consequently, have participated inappropriately as raters in this process.

Finally, to show even more dramatically the error of the Panel's recommendation in my case, I enclose as attachment "C", the final results of the Company's annual "Upward Feedback" analysis. While not dispositive of the issue of my skills, this report clearly shows my management skills of the type measured in the rating process

are excellent. Certainly from the perspective of my direct reports who best know my true actions and behaviors. Rod Odom also believes and has stated that I have the appropriate competitive skills. Thus, the Company has erred in the implementation of this Plan as it relates to me.

The Company's negligence in administering this Plan, and its Officers' improper involvement, have caused me grievous financial harm, undeserved public humiliation and significant emotional and physical suffering. With regard to the latter, this action has aggravated my medical condition of which the Company is well aware. I am, therefore, filing this claim under the Plan in an effort to allow the Company to cure its violation of the Plan, redefine the relevant universe and remove me from any identified surplus.

I will look forward to hearing from you in the immediate future. I can be reached at 396-3396.

Sincerely,

/s/ D. B. Sutton
D. B. Sutton

Attachments

cc: Rebecca Dunn (letter only)
H. C. Henry, Jr. (letter only)

ATTACHMENT 6

BELLSOUTH
TELECOMMUNICATIONS [LOGO]

Jane A. Killian
Operations Manager
Management Staffing

South E71-2
3535 Colonnade Parkway
Birmingham, Alabama 35243
205 977-8164

June 26, 1995

Mr. D. Barry Sutton
7455 Crompton Court, North
Dunwoody, GA 30350

Dear Mr. Sutton:

The following information is provided relative to the claims that you raised under the Competitive Management Restaffing Plan (CMRP) relating to the selection of your raters and the establishment of the JG 64 Universe:

Claim #1: You were allegedly identified through the CMRP process as lacking competitive skills.

Fact: The Panel Process was used to identify the comparatively lower rated managers within a defined universe for purposes of creating vacancies within that universe that would allow the company to hire managers possessing competitive skills. The process did not identify you specifically as lacking competitive skills.

Claim #2: The company failed to execute the announced terms of the Plan in selection of your raters.

Fact: Potential panel members are provided with the criteria for being a panelist and the five dimensions on which the affected managers

will be rated. To qualify for this position, they must have had approximately six months of significant exposure to the work of the manager to be rated, e.g., as in a supervisory or other frequent contact relationship or approximately one year or more of general, work-related exposure. This exposure generally should have occurred within the past three years. Both Mr. Jacobs and Mrs. North reviewed these panel member criteria and felt that they did have the general work-related exposure necessary to rate you.

Claim #3: The CMRP JG 64 Universe was improperly established.

Fact: Decisions relative to the groupings of JG 64 managers for purposes of handling force imbalances or administering the CMRP plan are made by the officers and group presidents based on the interchangeable nature of the competencies necessary to perform positions at that level. In this instance, the critical skills deficiencies were determined to exist in the JG 64 Universe at the group president level in the Business Units. The decision made by Charlie Coe and the four COU officers to group all 21 JG 64 managers into one universe was within the accepted parameters of the Force Management guidelines and thus, not a violation of policy or practice.

Based on the analysis and investigation of the allegations contained in your letter of June 13th, no evidence was found to support the claim, therefore, your claim is denied. As requested in your letter to Becky Dunn, Vice President – Human Resources; however, your appeal of

the denial of this claim will be forwarded to the CMRP Review Committee. The results of the Committee's review will be furnished to you in an expedited manner.

Sincerely,

/s/ Jane A. Killian

ATTACHMENT 7

Keith W. Kochler
General Attorney

BellSouth Telecommunications, Inc.
Legal Department – Suite 4300
675 West Peachtree Street
Atlanta, Georgia 30975-0001
Telephone: 404-629-7760
Facsimile: 404-654-3586

July 3, 1995

VIA FACSIMILE

James B. Rhoads
Swift, Currie, McGhee & Hiers
1355 Peachtree Street, N.E.
Atlanta, Georgia 30319-3238

RE: Barry Sutton

Dear Mr. Rhoads:

In accordance with our telephone conversation on June 30, 1995, the review of Mr. Sutton's CMRP appeal will be deferred until July 11, 1995. Any information that you would like placed before the Review Committee should be submitted no later than July 7 in order to provide adequate time for it to be copied, distributed, and considered by the Committee members. I recommend that you send any such information by facsimile to Jane Killian. Ms. Killian's fax number is (205) 977-2597.

During one of our conversations, you requested information concerning the guidelines used by the Company in determining the configuration of CMRP universes. At the key manager level, the Company's overall philosophy is to draw such universes as broadly as possible. This philosophy is consistent with the Company's view that senior managers can and should be assessed on the basis of commonly held generalist skills versus specific subject matter expert competencies.

Accordingly, key manager universes, which are drawn by pay grade, may include an entire Group President's organization, a Vice President's organization, or a combination of Vice Presidents' organizations where interchangeable competencies exist.

The foregoing philosophy has been followed by the Company in its administration of other severance pay plans, such as the Career Transition Assistance Plan ("CTAP").

I hope that this information is responsive to your question. If not, please do not hesitate to call me.

Sincerely,

/s/ Keith W. Kochler
Keith W. Kochler

KWK/hh

bc: /s/ Jane Killian
no attachment

ATTACHMENT 8

SWIFT, CURRIE, MCGHEE & HIERS
ATTORNEYS AT LAW
THE PEACHTREE
1355 PEACHTREE STREET, N.E.
SUITE 300
ATLANTA, GEORGIA 30309-3238
TELEPHONE (404) 874-8800
TELECOPIER (404) 888-6199

JAMES B. RHOADS DIRECT DIAL (404)888-6170

July 6, 1995

By FAX (404) 688-3988

Keith W. Kochler, Esq.
General Attorney
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375

Re: Barry Sutton CMRP ERISA Claim

Dear Keith:

Thank you for your letter of July 3. The information you furnished in that letter relating to the "Force Management guidelines" referred to on page 2 of the June 26, 1995 denial of Barry's Claim ("Denial") appears to me to be a summary of generalized information relating to general company policy and philosophy, rather than to specific guidelines addressed to administration and implementation of the CMRP Plan.

If there were or are any documents (e.g. memoranda, E-mail communications, or correspondence, policy manuals, etc.) setting forth, describing, articulating, clarifying or interpreting guidelines for identifying "universes . . . within organizations that have been identified as

having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive marketing intelligence", as described on Page 3 of the Plan, would you please furnish them to me? If there are no such documents, please let me know.

Further, if there are any similar documents or procedures that relate to the selection of raters under the Management Panel and Evaluation Process ("MPEP"), the "evaluation procedure selected by [BST]" as provided on Page 3 of the Plan, please furnish them as well. If there are no such documents, please let me know.

As I told you last Friday, I thought there was an apparent inconsistency in the relation between the time limits set forth in the Claims Procedures set out in Pages 7-9 of the Plan, and the 45 day period given Plan participants to consider and seek legal advice regarding the offer of benefits under the Plan. Barry mentioned this in his Claim, but the Denial did not address that portion of his Claim. I explained my view that it was unfair and possibly in violation of ERISA, to require a Plan beneficiary to release claims relating to application and administration of the Plan in order to receive Plan benefits. I thought it might be useful to you to provide you with a more detailed explanation of my reasoning.

In addition to the procedural problem, Barry's pending Claim, as you know, makes three major contentions as to why his selection for termination under terms of the Plan violated the Plan:

1. His organization, Small Business Services organization ("SBS"), was not one identified by its officer as

"having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive intelligence" at the Department Head level. Therefore neither Barry nor any other department head in SBS, should have been included in a CMRP Universe under announced Purpose of the Plan described in Page 1 of the Plan, nor under the identification terms described on Page 3 of the Plan;

2. The "competencies" evaluated under MPEP for the job grade 64 Universe are not consistent with the Purpose of the Plan, in that they were unrelated to the skill deficiencies illustrated in the Plan.

3. Barry's selection for termination under the Plan violated material terms of MPEP, because 2 of the 3 self-selected evaluators lacked the objective qualifications required in the written terms of MPEP.

If any of these claims is ultimately found to be meritorious, either by the review committee or upon review by a federal court under ERISA, we contend Barry would be entitled not to benefits under the Plan, but to reinstatement or back and front pay in lieu of reinstatement. If, on the other hand, none of these pending claims is ultimately found meritorious, Barry would be prepared to accept severance under the Plan, because such a finding would establish he was properly selected for being offered those benefits. I have advised Barry and he agrees that the CMRP benefits offered are not unreasonable for those properly selected under the Plan.

However under the current circumstances, BST is requiring Barry either to sign the Release by July 7, in which case he effectively waives his appeal rights, or to

fail to sign that release, in which case his employment with BST is terminated, and he gives up all rights to his CMRP benefit even if the denial of his claims is later upheld by the review committee or sustained on court review. This "Hobson's Choice" is inconsistent with the letter and spirit of ERISA.

As required by Section 503 of ERISA (29 USCA Section 1133), Pages 7-9 of the Plan describe a claims procedure for Plan participants " . . . to secure a review of any . . . matter related to the Plan if they believe they have been treated unfairly with respect to the Plan" ("Claims Procedure"). Section 503, of course, requires the Plan to provide for a "full and fair review" of any decision denying a claim. The Regulations promulgated by the Secretary of Labor in implementation of Section 503 provide that a Plan's claims procedures may not be " . . . administered in a way which unduly inhibits or hampers the initiation or processing of plan claims." (b)(1) (iii) and (iv) Time limitations prescribed by a plan must be reasonable in light of the subject matter of the claim. *See, e.g.,* 29 C.F.R. Section 2560.503-1(g)(3) and (h)(1).

In our discussions last Friday, you indicated in passing that you did not believe the Release was intended to include matters covered by Claims under the Plan, such as Barry's pending claim. As drafted, however, the release language is very broad and by its terms seems to include the very acts and omissions of BST and certain of its employees described in Barry's claim.

Requiring Barry to execute such a release by July 7 appears to require him to terminate prematurely his

appeal rights under the Plan on a claim he has timely filed. This termination occurs before the 60 days given him by the Plan to consider whether to appeal, and certainly before his appeal can be given "full and fair" consideration by the CMRP review committee, subject to ultimate review under ERISA by a federal court.

While Barry did file an "appeal" concurrently with his claim, he did so because of the July 7 deadline described above. He filed this "appeal" before he ever received the June 26 Denial from which he has the right of appeal, and before he consulted with me. You informed me on June 30, that the CMRP review committee was going to consider Barry's "appeal" at 2:00 PM on that day.

I asked you to request the review committee to postpone consideration of that appeal so I could fully review the matter, and advise him regarding his claim, reframe his appeal if necessary and advise him regarding the possible legal effects of his execution of the Release. Under these circumstance, you informed me the review committee would postpone its decision on Barry's "appeal" until July 11, 1995. You further informed me BST insisted that Barry's deadline for executing Release remain July 7, 1995.

I believe these actions unreasonably inhibit and hamper Barry in the initiation and processing of his claim. I also believe that by insisting Barry execute the Release on July 7, 1995, or be terminated without benefits, BST and the Plan's administrators and fiduciaries are, in effect discharging Barry or discriminating against him in order to prevent him from exercising his right to have his

claims and appeal fairly processed and his right to seek benefits under the Plan in violation of Section 510 of ERISA (29 U.S.C. Section 1140).

Further, because I do not even now know whether I have all "pertinent documents" which bear on the substance of his appeal, I believe I am inhibited and hampered in my ability to articulate his appeal by the artificial July 7 deadline you have imposed upon me in your July 3 letter to supplement Barry's "appeal", and to submit additional information.

For these reasons, I must ask again, this time formally, that you arrange to have BST extend the deadline for election and submission of the release to a date which will provide for the full and fair review of Barry's claims, as intended under ERISA. I can and will file the appeal on Barry's behalf within a timely interval following my receipt of the documents and information I have requested, and upon your assurance that I have received all documents pertinent to Barry's claims.

I believe the wording of the Plan allows such an extension in view of the above circumstances, without necessity of amending the Plan.

Please inform me today of your response to this request. I would be delighted to meet with you personally today to discuss more fully the issues raised in this letter.

Sincerely,

/s/ James B. Rhoads
James B. Rhoads

cc: Barry Sutton

ATTACHMENT 9

Keith W. Kochler
General Attorney

BellSouth Telecommunications, Inc.
Legal Department – Suite 4300
675 West Peachtree Street
Atlanta, Georgia 30375-0001
Telephone: 404-529-7759
Facsimile: 404-688-3988

July 7, 1995

VIA FACSIMILE & U.S. MAIL

James B. Rhoads
Swift, Currie, McGhee & Hiers
1355 Peachtree Street, N.E.
Atlanta, Georgia 30309-3238

RE: Barry Sutton

Dear Mr. Rhoads:

This will confirm the terms under which BST is willing to accommodate the concerns that you raised in your letter of July 6, 1995.

First, if your client is interested in participating in the CMRP Plan and receiving the severance payment and other benefits provided under that Plan, he must execute the CMRP Election and Release Form and return that form in the manner and within the time limits provided at his coverage meeting.

In response to your concerns, BST agrees that it will not assert your client's execution of the Election and Release as a bar to his pursuing an administrative appeal under the CMRP Plan. Likewise, BST will not assert your client's execution of the Election and Release as a bar to

his filing a lawsuit under ERISA that is based upon the claims that he presented to the CMRP Review Committee. All other legal claims encompassed under the terms of the release would be barred, and BST does not waive its right to assert the release as an absolute defense to such claims.

If your client does file an ERISA lawsuit, as a condition of filing such a lawsuit, he agrees to pay the net CMRP severance payment that he received into an escrow account that will be established under terms satisfactory to all parties. The payment will remain in this account pending the final disposition of your client's lawsuit. If the final disposition of that lawsuit is that there was no violation of ERISA, the severance payment and any interest accrued on that payment, will be returned to your client. If the final disposition of that lawsuit is that BST violated ERISA in its administration of the Plan, the severance payment, and any interest accrued on that payment, will be credited against any liability assessed against BST.

If your client does file an ERISA lawsuit, he nevertheless will be permitted to retain the other benefits provided under the CMRP Plan, which he agrees constitute adequate consideration to discharge all other legal claims encompassed by the release.

On behalf of your client, please acknowledge your agreement to the terms of this proposal by signing where indicated below. I would appreciate it if you would fax

me a copy of this letter bearing your signature before 5:00 p.m. on July 7, 1995.

Sincerely,

/s/ Keith W. Kochler
Keith W. Kochler

AGREED TO:

_____
JAMES B. RHOADS
ATTORNEY FOR BARRY SUTTON

ATTACHMENT 10

(5-95)
BST CMRP-4A

_____
Print Name

_____
Social Security Number

ADDENDUM B
page 1

BellSouth Telecommunication, Inc.
Competitive Management Restaffing Plan
BST CMRP
Election and Release

I accept the offer of BellSouth Telecommunication, Inc. or my Participating Company ("the Company") to allow me to terminate my employment under the provisions of the

BST Competitive Management Restaffing Plan ("BST CMRP" or "the Plan").

Prior to signing this Election and Release (hereinafter "Release"), I acknowledge that I had a period of at least forty-five (45) days in which to review this Release and the BST CMRP Summary Plan Description. At the outset of that 45-day time period, I was also advised to discuss the terms of the Plan with an attorney. I have had sufficient opportunity to do so, or, alternatively, to confer with individuals of my choice who are not associated with the Company. I fully understand the binding nature of this Release, and my decision to participate in BST CMRP has been made voluntarily.

In consideration for the separation incentive that is being extended to me under the Plan, I further agree to the terms set forth below:

(1) I hereby fully waive, discharge, and release any and all claims of whatever nature, known or unknown, I may have against BellSouth Telecommunications, Inc., its parent, subsidiaries, affiliated and related companies, their respective owners, representatives, officers, directors, attorneys, agents, employees, successors and assigns (hereinafter collectively referred to as "BST") as a result of actions or omissions occurring through this date. Specifically included in this waiver and release are any and all claims of alleged employment discrimination, either as a result of my separation of employment from the Company or otherwise, under the Age discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621, *et seq.*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, *et seq.*, and any and all claims under any other federal, state or local statutory or common law or regulation.

I also agree not to institute a lawsuit against BST relating to or arising out of any claim encompassed by this Release.

(2) I acknowledge that the separation incentive that is being extended to me under the terms of the Plan represents valuable consideration in addition to other forms of compensation or benefits to which I presently am entitled.

(3) I acknowledge that I am unaware of any actions or inactions by BST which I believe would constitute a violation of any federal, state, or local law, or rule promulgated by any administrative body which has jurisdiction over BST that I have not previously disclosed to the Company.

(4) In the event one or more of the provisions of this Release shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such a determination shall not affect any other provision of the Release, and this Release shall be construed as if such invalid or illegal or unenforceable provision had never been contained herein.

_____
(Initials)
5/95

(5) I acknowledge that the amount and other terms of the severance payment that I receive under the Plan are strictly confidential and I understand that I am not permitted to disclose those at any time to any person outside my immediate family without the prior written consent of my Participating Company, except as necessary in any legal proceedings brought under the Plan or pursuant to this Election and Release, to prepare and file income tax forms, or pursuant to court order after notice to my Participating Company.

(6) I understand that I may revoke my election to participate in BST CMRP by giving written notice to my Participating Company's BST CMRP Coordinator (at the address specified in the BST CMRP Summary Plan Description) within seven (7) calendar days following the date that I signed the Release. I understand my revocation notice, if sent by mail, must be postmarked within this seven (7) calendar day period. I further understand that this Release and my agreement to terminate my employment under BST CMRP will become binding and irrevocable after the expiration of that 7-day period.

(7) I understand that this Release is final and binding after the 7-day revocation period identified above, and I agree not to thereafter challenge its enforceability. Should I nevertheless attempt to challenge the enforceability of this Release, directly or indirectly (for example, by pursuing a claim, that is covered under the terms of the Release) as a further limitation on my right to make such a challenge, I agree first to tender to the Company, by certified check delivered to my Participating Company's BST CMRP Coordinator, all monies received pursuant to this Release, plus interest, and invite the Company to retain such monies and agree with me to cancel this Agreement. In the event the Company accepts this offer, the Company shall retain such monies and this Release shall be canceled. In the event the Company does not accept such offer, the Company will notify me and place such monies in an interest-bearing escrow account pending resolution of the dispute between me and the Company as to whether or not this Release shall be set aside and/or otherwise rendered unenforceable.

_____

Signature

_____

Name (Please print)

_____

Social Security Number

_____

Date

Rule of 65 Benefit Option: If, at separation, I am not service pension eligible but have at least ten (10) completed years of net credited service and the sum of my actual age and completed years of net credited service equals or exceeds sixty-five (65), i.e., I meet the Rule of 65, I elect to remit $1,000 from the net amount of my severance payment for access to the retiree MAP and DAP coverage, subject to the MAP and DAP provisions and limitations in effect on the date of my separation, and any subsequent Plan amendments, and subject to the service-related medical premium and the medical premium associated with the capped amount.

[ ] Yes, I accept the Rule of 65 Benefit Option.

[ ] No, I do not accept/am not eligible for the Rule of 65 Benefit Option.

[ ] I decline the offer of BST CMRP

Signature: _____ Date _____

Please Print Name: _____

ATTACHMENT 11

BEFORE THE CMRP REVIEW COMMITTEE

APPEAL OF D. BARRY SUTTON
From The Decision Of The BST CMRP Coordinator of June 26, 1995

This is the appeal, under the Claim and Appeal provisions of the Bellsouth Telecommunications ("BST") Competitive Management and Restaffing Plan ("CMRP") of D. Barry Sutton ("Sutton") from the decision of the BST CMRP Coordinator denying his claim of June 13, 1995.

SUMMARY OF RELEVANT FACTS

Effective May 1, 1995, BST issued its CMRP as a "welfare benefit plan" under the Employee Retirement Income Security Act (ERISA) of 1974.

On May 22, 1995, Sutton received a copy of the CMRP, together with forms CMRP 4 (notifying him of his severance pay benefit under CMRP), CMRP 2-A (notifying him that he and two other employees in job grade 64 had been "selected" for the "opportunity to separate employment" under CMRP.

At the time of the selection for participation in CMRP, Sutton was a job grade 64 Assistant Vice President in the Small Business Unit of the Customer Operations Oraganization [sic]. His "Departmental Officer" was R.D. Odom the Vice President of Small Business Services. Immediately prior to his selection, Sutton's performance reviews put him in Band 2, and he received, in February 1995, a pay increase of $3,900.00. This was the maximum allowed for individuals rated in performance Band 2. He also received a team award of 120% of standard which

recognized that his personal contributions and accomplishments relative to the strategic components of his commitments were substantial and significant.

During the initial implementation stages of CMRP, Odom did not declare a competitive skills deficit in the Small Business Operation at the department head level (JG64). Odom advised Sutton and others of this fact. Odom did, however, declare a competitive skills deficit in the Small Business Unit at the JG61 level. Indeed, of all officers at Odom's level, he declared the greatest percentage surplus at the JG61 universe.

Furthermore, Sutton's experience and performance reviews indicated that he possessed the kind of skills identified in CMRP as desirable such as " . . . understanding technology, market segment expertise [and] competitive market intelligence."

There was a sufficient number of individuals at JG 64 to construct a universe of adequate size as set forth in the CMRP by either combining those Customer Operations Units where a Competitive Skills deficit was declared at this manager level, or by forming individual universes specifically where such declarations were made as was done with all other jobgrades in the COUs. All universes other than JG 64 *were* constructed on a specific work group or business unit basis.

Nonetheless, a decision was made to include Sutton in the universe of JG64 employees who would be evaluated under the CMRP plan.

The method selected to implement CMRP was the Management Panel Evaluation Process (MPEP). The competencies to be rated under the MPEP were general competencies from the competency master list, and not the specific competencies identified as lacking under CMRP. Thus, Sutton, who indisputably possesses the competencies identified as desirable under CMRP was exposed to rating under MPEP on competencies which had nothing whatever to do with the competitive skills CMRP was designed to retain or acquire.

Nevertheless, Sutton was rated under MPEP by his manager Ron Odom and Judi North and Phil Jacobs. Neither North nor Jacobs had six months of significant exposure as could be gained through a supervisory or other frequent contact relationship or approximately twelve months or more of regular work-related interaction since well before May, 1992.

Further, neither North nor Jacobs could have been sufficiently knowledgeable of Sutton's performance in the past three years so that they could evaluate him on all any, [sic] much less all five of the competencies on which they were required to rate him. Those competencies were: Developing Others, Making Decisions, Organizing, Planning, and Taking Action. As noted above, those are not the competencies that CMRP was designed to enhance or improve.

Nevertheless, both Jacobs and North apparently took it upon themselves to rate Sutton. There is no indication anywhere in the information supplied by BST that anyone reviewed North's or Jacob's decision to rate Sutton. Based on information that Sutton has received, it was clear that

either North or Jacobs or both of them gave Sutton sufficiently low ratings that he was selected for participation in CMRP. Sutton, of course, did not know this until after his selection. **Further, Sutton did not have any opportunity to challenge the qualifications of either North or Jacobs to rate him under the CMRP procedures.**

On May 22, 1995, Sutton was presented with the option under CMRP to be terminated without benefits or to be terminated with benefits under CMRP.

On June 13, 1995 Sutton filed the claim that is now subject to review. On June 26, 1995 Jane A. Killian Operations Manager Management Staffing denied his claim. It is that decision from which Sutton appeals.

In August, 1995, Sutton was replaced by Jan Funderburg. In early 1995, Funderburg was Job Grade 61 on North's staff. Later in 1995, she was promoted to a Job Grade 62 or 63 and assigned to Charles Coe's staff. To the best of Sutton's knowledge, Funderburg has never worked for any company other than Bell. She has spent the last couple of years in a consumer (residence customer) staff assignment while Sutton was playing a leadership role in the study of the small business market segment (FNS II), helping to formulate company strategy for the Small Business unit and getting it up and running. Sutton also has far more experience in the collections part of the business that makes up a large portion of this current assignment and has held roles with far greater responsibility and scope in BST's marketing organization, which dealt directly with its business customers. It is interesting to note that Funderburg was not subject to the same rating process as Sutton, and was a protégé of Judi

North who, as noted above, improperly participated in Sutton's rating.

Of the three Job Grade 64 individuals who were selected for participation in CMRP, only Sutton was replaced by someone who had been employed by BST, and who did not have "competitive skills" of the type described in CMRP demonstrably superior to those of the displaced BST employee.

SUMMARY OF PERTINENT DOCUMENTS

Pertinent CMRP Plan Provisions

PURPOSE

The Bell South Communication, Inc. Competitive Management Restaffing Plan (BSP CMRP) provides severance assistance to eligible management employees for terminating employment with . . . BST . . . or any of its Participating Companies so that BST can hire individuals who possess critical skills that BST requires in order to compete in the telecommunications industry.

ADMINISTRATION

At the request of the departmental officer within whose organization the deficit competitive skills exists, the decision to utilize BST CMRP shall be approved by the BST Vice President responsible for Human Resources. Thereafter, the implementation and administration of the Plan are subject to the discretion of the BST Vice President with Human Resources responsibility exercised in a manner consistent with the terms of

the plan. This includes . . . approving and overseeing the implementation of the Plan, . . . identifying and selecting BST CMRP participants.

BST CMRP Universes will be approved within organizations that have been identified as having a critical skill deficiency in areas such as understanding technology, market segment expertise, or competitive market intelligence.

Using an evaluation procedure selected by the Participating Company the overall effectiveness of each manager in the group will be rated and ranked from highest to lowest.

PLAN ADMINISTRATION

Bell South Telecommunications, Inc. is the BST CMRP Sponsor and Administrator. BST has delegated Plan administrative responsibilities as follows:

BST has delegated to its Vice President responsible for human resources the overall fiduciary responsibility for administering BST CMRP on behalf of BST and the Participating Companies and for making determinations, consistent with the terms of the plan, concerning when and to which individuals or groups BST CMRP will be offered.

BST is delegated to the applicable BST CMRP's headquarters coordinator the fiduciary responsibility to review, and to grant or deny claims that are filed under the plan.

BST has delegated to the BST CMRP review committee the fiduciary responsibility of affording a full and fair review of all appeals resulting from denied claims or any other dispute arising

out of the interpretation or administration of the plan.

Pertinent MPEP Guidelines For The Selection Of Panelists

Departments are responsible for identifying appropriate raters for each panel, **for ensuring the raters meet the panelists selection criteria**, for ensuring they fully understand their responsibilities under the process, and for obtaining their concurrence to participate in the process. There should be a minimum of two (preferably three) and a maximum of five raters for each individual being rated.

The following guidelines for the selection of panelists have been established to ensure the fairness of the process for the individuals being rated:

WORKING RELATIONSHIP:

The following individuals from **within the department** are appropriate raters for an individual-**provided they meet the other panelist selection criteria** (Emphasis added):

Current Supervisor	Former Supervisor
Current Supervisor's Supervisor	Former Supervisor's Supervisor

Peers of the ratee's current supervisor or current boss' boss within the department.

If insufficient raters can be identified within the department to rate an individual, former supervisors (boss or boss' boss) who have left the department for no more than approximately

twelve months, or former supervisors (boss or boss' boss) who have left the payroll for no more than approximately six months, may be utilized. During the panel session, these raters may rate only managers who they have supervised.

KNOWLEDGE OF RATEES:

Raters must be sufficiently knowledgeable such that they can evaluate the ratees that they are to rate on all five competencies that have been selected by the department for use in the process. (Emphasis added).

LENGTH OF WORK EXPOSURE:

A minimum of six months of significant exposure, as could be gained through a supervisory or other frequent contact relationship, or approximately twelve months or more of regular work-related interaction. (Emphasis added).

TIME FRAME FOR WORK EXPOSURE:

Supervisory or other work-related exposure to the work of a individual should have been within the past three years. (Emphasis added).

ARGUMENT

POINT ONE Sutton's Selection For Termination Under CMRP Was Contrary To The Purpose Of The Plan.

The express purpose of the CMRP was to create vacancies so that BST could hire " . . . individuals who possess critical skills that BST requires in order to compete in the telecommunications industry". Such "critical

skills" were further defined in the Plan by way of illustration as including " . . . understanding technology, market segment expertise, or competitive market intelligence".

By implication, the goal of CMRP was, therefore, to increase the number of individuals possessing "critical skills", not either to decrease or to merely keep the same number of employees possessing such skills.

It cannot be disputed that Sutton possessed the "critical skills" identified in the CMRP as desirable. Specifically, his experience as a Regional Sales Manager and Sales Vice President in highly competitive territories, as well as various staff positions he held, exposed him personally and directly to fully competitive situations with other vendors vying for Bell's customers. He was highly successful in those situations. This fact is attested to by the record of success that his organization enjoyed under his leadership, and by the performance reviews given him while in those positions.

Nevertheless, Sutton was selected for termination under the plan after having been rated on skills having no relationship to the skills identified as desirable under the Plan. These actions in and of themselves were demonstrably contrary to the purpose of the Plan. The denial of Sutton's claim protesting these actions on this ground was arbitrary and capricious, cannot be sustained under ERISA, and should be reversed.

That conclusion is even more clearly demanded because BST has replaced Sutton with a long time BST employee who, by any objective, standards possesses less significant background and experience, and less of the "critical skills" than Sutton. Thus the net result of BST's

action under CMRP **as applied to Sutton is to decrease** the quantity and quality of the "critical skills" identified in the CMRP among BST grade 64 employees in the Customer Operations Group.

POINT TWO BST Breached Its Fiduciary Duty To Ensure That All Of Sutton's Raters Were Qualified Under Both The Written And Stated Terms Of The Plan.

Judi North and Phil Jacobs improperly participated in this process with full awareness that they did not qualify under the letter or spirit of the plan, that they executed their ratings in a manner prejudicial to Sutton. BST did not take adequate steps or precautions to avoid this possibility, although it had the responsibility to do so.

- The Plan specifically states that rankings will be based on performance and that each individual rated will have between 2 and 5 raters who are familiar with this individual's work.

- The Plan further stipulates that raters must be able to rate the individual in question in each of the 5 compentency areas chosen and must have at least six months of significant exposure as could be gained through a supervisory or other frequent contact relationship or one year of general exposure to the work of the people they are rating.

- The published guidelines for the selection of panelists further suggests that this "general exposure" consist of ***"regular, work-related interaction"***.

- During the Charlie Coe led coverage of the CMRP to the District level and above managers of the Customer

Operation Units on May 1, 1995, Sam Rasor, the Human Resources Department Head, covered the specifics of the Plan and responded to questions. When asked (by Sutton) in the full group setting, how far back one should go in considering whether their knowledge of work and performance was recent enough for them to serve as a rater, Mr. Rasor replied, "Generally, about 6 months, maybe a little longer, but you wouldn't want to go back more than a year." There are several managers who were at this meeting who are prepared to testify to this fact.

• Every COU Officer was in this meeting. Charlie Coe was at the front of the room with Rasor. Sutton's ultimate raters, Odom and Jacobs, were in the front row of the audience, and Judi North was 5 to 6 rows back. Each of these Officers heard the question and the answer. It was either the only question or the first of two asked at this particular juncture when the floor was first opened to questions. No one, including these Officers, took exception to this statement by Rasor nor did they offer any comment or clarification then, or at any time subsequent to this meeting.

• When BST formulates and promulgates an ERISA Plan like CMRP, it has, and acknowledges, its legal responsibility to operate the plan in accordance with its terms and in the interest of the Plan participants. It is reasonable to assume that BST's Human Resources Department Head's unchallenged position relative to rater qualifications would be construed as terms the raters – particularly Officer raters – would abide by. They are precisely the terms that Sutton abided by in his own rating of subordinate managers.

• Neither North nor Jacobs, knowing the letter and spirit of the Plan with respect to rater qualifications, as well as the requirement to sufficiently know Sutton's actual performance to the extent necessary to rate him in 5 separate skill dimensions, should have rated him.

• Dick Anderson is another COU Officer whose personal exposure to Sutton's performance, while neither recent or extensive, is substantially more recent that North's. It is also far more extensive, and as recent as Jacobs, yet he declined to rate Sutton as he recognized he did not have adequate recent exposure to or knowledge of his performance to serve as a rater. Given Anderson's bias for action in situations such as these, we suggest this is very telling.

• Various materials were provided to raters prior to the rating session itself, including information on the dimensions, or competencies to be rated, the behaviors which reflect the required skills and abilities and the opportunities to observe them demonstrated. A cursory review of these materials, along with the information they had received relative to rater qualifications, would have made it abundantly clear to both North and Jacobs that they could not objectively and personally judge Sutton's current performance as the Plan intended. Especially given the substantial passage of time – 3 to 4 years – since their period of actual interaction or business contact.

• Once in the actual rating sessions, the Panel process introduction delivered by Human Resources personnel includes instruction, performance statements and exercises which would have again highlighted their

unsuitability as raters under the Plan. This information was either not delivered as prescribed or it was ignored.

• In the instructions as how to rate employees, the raters are told the following:

- Read and review the Performance Statements.
- Recall aspects of the employee's past behaviors which you have observed.
- Compare these to the Performance Statements.
- Rate the employee against the standard.

Inasmuch as neither Jacobs nor North has had work-related contact with Sutton in over three years, they were and are not able to comply within either the letter or spirit of the plan with respect to steps 2, 3, or 4.

• Except for large conferences or meetings of a general nature, such as Senior Manager Conferences, Sutton has not been in so much as a single business meeting with either Jacobs or North in over 2 years. Prior to that time and going back to May of 1992, (over 3 years) Sutton has only been in a single, and minor interactive business meeting with each one. Dates and details of these brief (less than 30 minute) interactions can be provided. Neither North nor Jacobs has been exposed to Sutton or his work in any direct manner that would provide either of them with the first hand knowledge they would need to rate his performance in any, much less all, of the dimensions selected for this p.g. 64 universe.

• Since Jacob's appointment to Officer, Sutton has had no work-related contact with him whatsoever. They were peers in the same organization for a fairly short period of time between 1991 and May of 1992 when Sutton left

Premises Marketing and moved to Small Business FNS Project.

• With respect to Judi North, Sutton last worked with her in early 1991. Prior to that time and back to March of 1989, he reported to her through Hal Davis. Virtually all of Sutton's contact with North was direct and it occurred on a daily basis for the most part during this time. She assigned his performance ratings during this period and discussed his appraisals, ratings and salary treatments.

• While working with North, Sutton was given top ratings and individual Incentive Awards (IIAs) which he was told were as high as any she was awarding during this period. Whenever he sought counseling or advice as to what he could or should do differently to enhance his performance, both real and perceived, she invariably told him that he should just keep doing what he was doing.

• While it may seem unusual that a person of Sutton's level would have so little contact with Officers within his segment, that doesn't alter the facts. Sutton was not to be evaluated on his degree of visibility or his relative interest in obtaining it. He busied himself performing with excellence those functions assigned to him in the small Business organization. His appraisals and ratings uniformly and consistently reflect this. So does the anonymous, formal upward feedback from his direct subordinates who best know his actions. That report for the most recent period also reflects consistently good work and well developed leadership skills. A copy of that feedback report is attached as Attachment 1. In 1994, the

first year of a strategic component within the management team award, Sutton's contribution was recognized with a 120% payout.

The Company's June 26 response contains no indication that anyone reviewed North's and Jacobs' decisions to insert themselves improperly in Sutton's rating process. Rather, it states, "Both Mr. Jacobs and Mrs. North reviewed these panel member cirteria [sic] ***and they felt that they did have the general work-related exposure necessary to rate [Sutton]"***. (Emphasis added). From this response, it is clear that neither before nor after Sutton's claim was filed has anyone reviewed this matter to determine whether, in fact, Jacobs or North possessed the required qualifications to rate Sutton under CMRP.

The Company's negligence in exercising its acknowledged fiduciary responsibility to administer all aspects of the CMRP in the interest of those affected by it, and the decisions of its Officers, Julia North and Phillip Jacobs each and several, has caused Sutton grievous financial harm, undeserved public humiliation and emotional and physical suffering requiring redress by the Company or, failing that, the judicial system.

POINT THREE The decision to include Sutton in the CMRP universe was arbitrary, capricious and improper. Furthermore, the Company has manipulated this Plan with respect to Sutton in order to provide Officers with the opportunity to eliminate him without respect to his actual skills, behavior or performance against those dimensions chosen for evaluation.

• Ron Odom, the Departmental Officer of the organization Sutton was in did not declare a competitive skills

deficit in his unit at the Department Head level (JG 64). He did, however, declare the greatest percentage surplus at the JG 61 universe of any of the COUs. The latter speaks to his relative "toughness" at making a hard decision as to the presence of competitive skill gaps.

Constructing a universe in either fashion indicated above would have insured the individuals from any non-surplus unit could not have been rated and potentially terminated inappropriately by individuals (raters) who were either not sufficiently familiar with their actual performance in the selected dimensions, or who were willing to abuse this process to eliminate individuals for personal, rather than performance reasons. Building universes in this manner would have further insured that any actual force elimination would have occurred from those units where a competitive skills deficit was in fact acknowledged and declared in the best interest of both the Company and the individuals involved.

- Other specific universes in the organization were established on a work group basis and not subjected to the "Panel" process when no surplus was declared at their level within their unit.

Examples:

IPOS-AIN	3 JG 61s/ 0 surplus
IPOS-Support	3 JG 61s/ 0 surplus
Oper. Svcs.	7 JB 61s/ 0 surplus

- Other universes consisting of as few **as 3** individuals ***were*** constructed where a surplus was declared and identified to an individual through the Panel rating process.

Example: Public Comm. 3 JG 61s/ 1 surplus

This speaks further to the fact that JG 64 universes should have been constructed on the basis of declared surpluses consistent with other paygrades as *no* Officer work group consisting of less than 3 JG 64s exists.

- Had the universe of JG 64s been constructed as it was with all other manager levels Sutton would not have been in a universe to be rated nor subjected to being rated by individuals not qualified to serve as raters under the terms of the Plan.

- The Company's contention in its June 26 response to Sutton's Claim that the decision to group all JG 64 managers into one universe because of the "interchangeable nature of the competencies necessary to perform positions at that level", as well as its contention that this decision was "within the accepted parameters of the Force Management Guidelines", are each specious and without merit inasmuch as the Company cannot reasonably argue that the nature of these competencies – particularly those assessed in the panel process – are any less interchangeable at the JG 61 level, where universes were not combined, than they are at the JG 64 level; **nor has it been able to produce the so called "Force Management Guidelines" it references in this response.** Historical movement of personnel at the District (JG 61) level between those customer segment organizations that now comprise the "Charlie Coe organization" has been quite common (if not more common than JG64 movement) and this fact can be easily demonstrated. Indeed, Sutton himself served with distinction as a District Level in both of the organizations which are now known as the Consumer and Complex departments. Furthermore, it was even articulated by both Human Resources individuals and

Officers within the Coe organization, as well as Coe himself, that movement of both JG 61 and 64 individuals between the various customer segmented departments could likely occur following the separation process.

- It is our contention that the JG 64 universe was specifically constructed in a manner that would insure those Sutton was "out of favor" with would have the opportunity to eliminate him through subjective discrimination. Since each COU Officer individually identified their JG 64s who they believed lacked the competitive skills necessary to "take the Company forward" (and Odom declared none) in determining that the number of people to be eliminated from this universe was 3, there was no other legitimate reason to include him or any other managers from COUs where no deficiency was noted. As an aside, by this act, and Jacobs' and North's actions, at least one individual deemed to be deficient by their direct boss has effectively "escaped" identification in this process.

CONCLUSION

For the above reasons, Sutton requests that the CMRP Review Committee reverse the decision of BST CMRP Coordinator and uphold Sutton's Claim by restoring him to his former position, awarding him full back pay, and restoring all benefits to which he would have been entitled had he not been selected under CMRP.

Respectfully submitted this 25th day of August, 1995.

SWIFT, CURRIE, McGHEE & HIERS

By: /s/ James B. Rhoads
James B. Rhoads
Attorneys for D. Barry Sutton

The Peachtree
Suite 300
1355 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 874-8800

ATTACHMENT 12

BELLSOUTH
TELECOMMUNICATIONS (LOGO)
Human Resources Staffing
1760 Century Circle, Suite 6
Atlanta, Georgia 30345

October 17, 1995

James B. Rhoads, Esq.
Swift, Currie, McGhee & Hiers
Suite 300
1355 Peachtree Street, N.E.
Atlanta, Georgia 30309-3238

Dear Mr. Rhoads:

The BST Competitive Management Restaffing Plan (BST CMRP) Review Committee met on September 11, 1995 to consider the concerns that were expressed in your August 25, 1995 letter (along with its Attachment C which was received on September 6, 1995) transmitting the appeal of D. Barry Sutton. As you were previously advised, the

letter was referred to the Review Committee as a formal appeal.

Based on the information that was provided, the following concerns were addressed:

> Whether Mr. Sutton was properly included in the BST CMRP universe.
>
> Whether the two named individuals who rated Mr. Sutton were qualified to do so.
>
> Whether Mr. Sutton's offer of separation under the provisions of the Plan was contrary to the purpose of the Plan.

All data related to developing the BST CMRP universe for the organization, to the selection process, and to the administration of the plan were re-evaluated and the Review Committee found as follows:

Senior managers generally have been grouped into broader force management universes since they are considered to be generalists rather than specialists, and as such, to have skills that are interchangeable within a broader organization. As you are aware, the Customer Operations group determined that it was deficient in certain critical skills at the job grade 64 level. Mr. Sutton and the other job grade 64's within that organization were included in a single BST CMRP universe. Based upon a review of all the information available to it, the Review Committee has concluded that Mr. Sutton was properly included in that universe.

The Review Committee also evaluated the qualifications of the two managers who rated Mr. Sutton, and whose participation was questioned in the appeal. In order to

qualify as a rater, a manager must have a degree of direct or indirect knowledge of the ratee that is relevant to each of the five competencies selected by the department. In addressing Mr. Sutton's appeal, the Review Committee confirmed that both of the panelists in question were qualified to evaluate your client based on a combination of their direct interaction with him, their knowledge of his work product, and/or their knowledge of his performance that was acquired through activities such as performance evaluation discussions that occurred within the organization.

The Review Committee likewise addressed the issue concerning whether or not Mr. Sutton's offer of separation under the provisions of the plan was contrary to its purpose. The purpose of the plan is, through the creation of vacancies, to enable the company to hire individuals who possess critical skills. Vacancies are created through offering separation to managers in a defined universe who, relative to the other managers in the universe, are the least effective performers. Following creation of the vacancies, the managers in the universe who remain may be reassigned to open positions, and the net vacancies created through use of the plan are then filled through competitive hiring. This is addressed specifically in the "Identifying and Selecting BST CMRP Participants" section on page 3 of the Plan. In Mr. Sutton's universe, the evaluation process was used to develop a sequential listing of the incumbents in order of their overall effectiveness and offers of separation were made based on that listing, in inverse order of overall effectiveness. The evaluation process was administered in accordance with its guidelines and the effectiveness ranking was used in the

application of BST CMRP in accordance with plan provisions. Based on this, there was no indication that Mr. Sutton's offer of separation was contrary to the provisions of the plan.

The Review Committee further addressed the concern expressed in the appeal that Mr. Sutton's position was backfilled through a promotion from within the company, versus with an external hire. As described previously, the plan requires that competitive hiring be used to fill the net vacancies created through use of the plan. In the case of this universe the Customer Operations group sought to create four vacancies. The Committee found that, shortly after the application of BST CMRP to the universe, a fifth vacancy occurred due to the unanticipated loss of an additional manager from the original universe, that was unrelated to the application of the plan. The managers who then remained in the universe were assigned to open positions; four of the five vacancies have been or are pending being filled through competitive hiring, in accordance with Plan provisions; and the fifth position was filled at the discretion of the company, in this case through an internal promotion. Based on the availability of the fifth vacancy, and no plan provisions that would restrict either the designation or the method of filling of that vacancy, there is no indication that backfilling Mr. Sutton's position with an internal promotion was contrary to the terms of the plan.

In summary, the Committee found no evidence either that the evaluation process was incorrectly applied or that the separation plan was incorrectly implemented. Based on

this, the BST CMRP Review Committee has denied the appeal.

/s/ R C McLaughlin

Secretary – BST CMRP Review Committee

cc: D. Barry Sutton

[Attachments 13 and 14 Omitted In Printing]

ATTACHMENT 15

ESCROW AGREEMENT

THIS ESCROW AGREEMENT is made and entered into this 15th day of January, 1997, by and among **BellSouth Telecommunications, Inc.**, a Georgia corporation (hereinafter called "**BST**"); **D. Barry Sutton** (hereinafter called "**Sutton**"); and **Kearns & Associates**, a Georgia Professional Corporation (hereinafter called "**Escrow Agent**").

WITNESSETH

WHEREAS, BST and Sutton are parties to an action styled **Barry D. Sutton v. BellSouth Telecommunications, Inc., et al.**, Civil Action No. 1:96-CV-1842 (hereinafter called the "**Action**"), pending in the United States District Court for the Northern District of Georgia (hereinafter called the "**Court**");

WHEREAS, the Action pertains to certain alleged claims under the Employment Retirement Income Security Act of 1974 in connection with the BellSouth Telecommunications, Inc. Competitive Management Restaffing Plan, effective as of May 1, 1995 (hereinafter called the "**Plan**");

WHEREAS, in connection with the Action, BST and Sutton desire to provide for the deposit into escrow of certain funds that were paid by BST to Sutton pursuant to the Plan;

WHEREAS, BST and Sutton have requested Escrow Agent to act as escrow agent for such deposit of funds; and

WHEREAS, Escrow Agent is willing to serve as escrow agent for such deposit of funds, subject to the terms, conditions and provisions of this Agreement.

NOW, THEREFORE, for and in consideration of the foregoing premises and the mutual covenants and agreements set forth herein, the parties hereto do hereby covenant and agree as follows:

1. ***Appointment of Escrow Agent***. BST and Sutton do hereby appoint Escrow Agent as escrow agent pursuant to this Agreement. Escrow Agent does hereby

accept such appointment, and agree to serve as escrow agent pursuant to this Agreement, subject to and in accordance with the terms, conditions and provisions of this Agreement.

2. ***Deposit of Escrow Fund.*** Contemporaneously with the execution and delivery of this Agreement, Sutton has delivered or caused to be delivered to Escrow Agent the sum of **Seventy Nine Thousand Two Hundred Sixty Five Dollars ($79,265.00)**, (which sum, together with all interest actually earned thereon while held by Escrow Agent pursuant to this Agreement, is hereinafter called the "**Escrow Fund**").

3. ***Investment of Escrow Fund.*** The following provisions shall govern the investment of the Escrow Fund:

(a) During the term of this Agreement, Escrow Agent shall invest the Escrow Fund (including all interest earned thereon) in a Money Market Savings Account at First Union Bank at the prevailing rate of interest.

(b) All out-of-pocket expenses incurred by Escrow Agent in connection with the investment of the Escrow Fund shall be reimbursed by Escrow Agent to itself out of the Escrow Fund. Escrow Agent is hereby expressly authorized to make any such reimbursement.

(c) All interest income for the interest earnings on the Escrow Fund shall be reported to the Internal Revenue Service and all applicable State taxing authorities as required by law. The Federal Tax Identification Numbers of the parties are as follows: **(i) BST 58-0436120**; and **(ii) Sutton 261-80-7812.**

4. ***Disbursement of the Escrow Fund.*** The Escrow Fund shall be disbursed only as set forth in this **Paragraph 4** or as set forth in **Paragraph 5(b)**, below:

(a) Upon Escrow Agent's receipt of joint notice from BST and Sutton of their agreement upon the manner of the disbursement of the Escrow Fund and setting forth express joint instructions for the disbursement of the Escrow Fund, Escrow Agent shall disburse the Escrow Fund in accordance with such notice.

(b) Upon Escrow Agent's receipt of a certified copy of an Order of the Court expressly instructing Escrow Agent to disburse the Escrow Fund and setting forth the express joint instructions for the disbursement of the Escrow Fund, Escrow Agent shall disburse the Escrow Fund in accordance with such Order; ***provided, however,*** that, unless such Order has been entered upon the express consent of both BST and Sutton and such consent is evidenced thereon, Escrow Agent shall not disburse the Escrow Fund pursuant to such Order until all periods for appeal thereof have expired without an appeal having been filed and, if an appeal is filed, the appealed Order shall no longer be deemed effective to authorize the disbursement of the Escrow Fund notwithstanding the resolution of the appeal and, in such event, a new Order of the Court shall be obtained.

(c) The disbursement of the Escrow Fund pursuant to this **Paragraph 4** shall be made promptly upon the occurrence of the event described in this **Paragraph 4** authorizing such disbursement.

Upon disbursement of the Escrow Fund pursuant to this **Paragraph 4** or **Paragraph 5(b)**, below, the escrow created

under, and all duties and obligations of Escrow Agent under, this Agreement shall automatically terminate.

5. ***Liability of Escrow Agent***. The duties, obligations, liabilities and responsibilities of Escrow Agent under this Agreement shall be subject to the following conditions:

(a) In performing any of its duties hereunder, Escrow Agent shall not incur any liability to anyone for any damages, losses or expenses, including, without limitation: (i) any action taken or omitted upon advice of its legal counsel given with respect to any questions relating to the duties and responsibilities of Escrow Agent under this Agreement; or (ii) any action taken or omitted in reliance upon any instrument, including any written notice or instruction provided for in this Agreement. Escrow Agent may rely upon any instrument, pursuant to **clause (ii)** in the preceding sentence, as being duly executed, valid and effective, and as containing accurate information and genuine signatures.

(b) Notwithstanding anything in this Agreement to the contrary, in the event of a dispute between BST and Sutton arising prior to or at the time of the disbursement or other disposition of the Escrow Fund by Escrow Agent pursuant hereto, which dispute shall be sufficient, in the sole discretion of Escrow Agent, to justify its doing so, Escrow Agent shall be entitled to tender the Escrow Fund into the registry or custody of the Court or, if the Action is no longer pending, any court of competent jurisdiction, together with such legal pleadings as it may deem appropriate, and thereunder Escrow Agent shall be discharged from all further duties and liabilities

under this Agreement. Any such legal action may be brought in such court as Escrow Agent shall determine to have jurisdiction thereof. Escrow Agent's determination of whether a dispute exists between BST and Sutton shall be binding and conclusive upon all parties hereto, notwithstanding any contention that no dispute exists.

(c) Sutton and BST shall, and do hereby, jointly and severally indemnify, defend and hold Escrow Agent harmless from, against and in respect of: (i) any and all demands, judgments, expenses, costs, losses, injuries or claims of any kind whatsoever whether existing on the date hereof or hereafter arising, incurred by Escrow Agent by reason of, from or in connection with this Agreement or any action taken or not taken by Escrow Agent under or in connection with this Agreement; and (ii) any and all counsel fees, expenses, disbursements of counsel, amounts of judgments, demands, assessments, costs, fines or penalties, and amounts paid in compromise or settlement, incurred or sustained by Escrow Agent by reason of, in connection with or as a result of any claim, demand, action, suit, investigation or proceeding (or any appeal thereof or relating thereto or other review thereof) incident to the matters covered by the immediately preceding **clause (i)**.

(d) If Escrow Agent shall notify BST and Sutton of its desire to be relieved of any further duties and obligations under this Agreement, then Escrow Agent shall deliver the Escrow Fund to a successor escrow agent designated by BST and Sutton. If BST and Sutton shall fail to agree upon and designate a successor escrow agent within

ten (10) days after having been requested by Escrow Agent to do so, then Escrow Agent shall in its discretion designate the successor escrow agent. In the event Escrow Agent designates a successor escrow agent, the successor escrow agent shall be a bank or trust company having trust powers in good standing and located in Atlanta, Georgia. the successor escrow agent shall agree to be bound by all the terms and conditions of this Agreement. Immediately upon agreement by the successor escrow agent to be bound by all the terms and conditions of this Agreement, the original Escrow Agent shall be relieved of any and all duties, obligations, liabilities or responsibilities under or in connection with this Agreement; ***provided, however***, that no successor escrow agent shall assume any liability for the acts or omissions of its predecessor escrow agent or agents under this Agreement.

(e) The agency created in Escrow Agent hereby is coupled with an interest of BST and Sutton and shall be binding upon and enforceable against the respective heirs, successors, legal representatives and assigns of BST and Sutton. This escrow shall not be revoked or terminated by reason of the death, incompetency, dissolution or liquidation of BST or Sutton, but shall continue to be binding upon and enforceable against the respective heirs, successors, legal representatives and assigns of BST and Sutton in the manner provided herein. In the event of the death, incompetency, dissolution or liquidation of BST or Sutton, Escrow Agent may rely and act upon any notices permitted or required to be given hereunder from any person, firm partnership or corporation believed by Escrow Agent in good

faith to be the heir, successor, legal representative or assign of such dissolved or liquidated party.

6. *Acknowledgment by Escrow Agent.* Escrow Agent Expressly acknowledges that it has not acted as legal counsel to Sutton or BST in connection with this Action or otherwise, nor is there any other professional, personal, or family relationship between Escrow Agent and Sutton or BST that would compromise Escrow Agent's ability to perform its obligations under this Agreement.

7. *General Provisions.*

(a) *Notices.* Whenever any notice, demand or request is required or permitted under this Agreement, such notice, demand or request shall be in writing and shall be delivered by hand, be sent by registered or certified mail, postage prepaid, return receipt requested, or be sent by nationally recognized commercial courier for next business day delivery, to the addresses set forth below their respective executions hereof, or to such other addresses as are specified by written notice given in accordance herewith, or shall be transmitted by facsimile to the number for each party set forth below their respective executions hereof, or to such other numbers as are specified by written notice given in accordance herewith. All notices, demands or requests delivered by hand shall be deemed given upon the date so delivered; those given by mailing as hereinabove provided shall be deemed given on the date of deposit in the United States Mail; those given by commercial courier as hereinabove provided shall be deemed given on the date of deposit with the

commercial courier; and those given by facsimile shall be deemed given on the date of facsimile transmittal. Nonetheless, the time period, if any, in which a response to any notice, demand or request must be given shall commence to run from the date of receipt of the notice, demand or request by the addressee thereof. Any notice, demand or request not received because of changed address or facsimile number of which no notice was given as hereinabove provided or because of refusal to accept delivery shall be deemed received by the party to whom addressed on the date of hand delivery, on the date of facsimile transmittal, on the first calendar day after deposit with commercial courier, or on the third calendar day following deposit in the United States Mail, as the case may be.

(b) ***Assignment; Binding Effect.*** The rights of the parties under this Agreement are personal and may not be assigned without the prior written consent of the other parties hereto. Subject to the foregoing, this Agreement shall be binding upon and enforceable against, and shall insure to the benefit of, the parties hereto and their respective heirs, legal representatives, successors and permitted assigns.

(c) ***Headings.*** The use of headings, captions and numbers in this Agreement is solely for the convenience of identifying and indexing the various provisions in this Agreement and shall in no event be considered otherwise in construing or interpreting any provision in this Agreement.

(d) Defined Terms. Capitalized terms used in this Agreement shall have the meanings ascribed to them at the point where first

defined, irrespective of where their use occurs, with the same effect as if the definitions of such terms were set forth in full and at length every time such terms are used.

(e) *Pronouns*. Wherever appropriate in this Agreement, personal pronouns shall be deemed to include the other genders and the singular to include the plural.

(f) *Severability*. If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall ever be held to be invalid or unenforceable, then in each such event the remainder of this Agreement or the application of such term, covenant, condition or provision to any other person or any other circumstance (other than those as to which it shall be invalid or unenforceable) shall not be thereby affected, and each term, covenant, condition and provision hereof shall remain valid and enforceable to the fullest extent permitted by law.

(g) *Non-Waiver*. Failure by any party to complain of any action, non-action or breach of any other party shall not constitute a waiver of any aggrieved party's rights hereunder. Waiver by any party of any right arising from any breach of any other party shall not constitute a waiver of any other right arising from a subsequent breach of the same obligation or for any other default, past, present or future.

(h) *Rights Cumulative*. All rights, remedies, powers and privileges conferred under this Agreement on the parties shall be cumulative of and in addition to, but not restrictive of or in lieu of, those conferred by law.

(i) *Time of Essence.* Time is of the essence of this Agreement. Anywhere a day certain is stated for payment or for performance of any obligation, the day certain so stated enters into and becomes a part of the consideration for this Agreement. If any date set forth in this Agreement shall fall on, or any time period set forth in this Agreement shall expire on, a day which is a Saturday, Sunday, federal or state holiday, or other non-business day, such date shall automatically be extended to, and the expiration of such time period shall automatically be extended to, the next day which is not a Saturday, Sunday, federal or state holiday or other non-business day.

(j) *Applicable Law.* This Agreement shall be governed by, construed under and interpreted and enforced in accordance with the laws of the State of Georgia.

(k) *Entire Agreement.* This Agreement contains the entire agreement of the parties with respect to the subject matter hereof, and all representatives, warranties, inducements, promises or agreements, oral or otherwise, between the parties not embodied in this Agreement shall be of no force or effect.

(l) *Modifications.* This Agreement shall not be modified or amended in any respect except by a written agreement executed by the parties in the same manner as this Agreement is executed.

(m) *Counterparts.* This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of such counterparts together shall constitute one and the same instrument.

IN WITNESS WHEREOF, BST, Sutton and Escrow Agent have caused their respective duly authorized representatives to execute, seal and deliver this Agreement, all as of the day and year first written above.

BST:

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation

By: /s/ Paul T. Stagliano (SEAL)
Name: PAUL T. STAGLIANO
Title: GENERAL ATTORNEY

Date of BST's Execution:

1/15/97

Initial address for notices:
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375
Attention: Paul Stagliano, Esq.
Telephone No.: (404) 335-0734
Telecopy No.: (404) 688-3988

SUTTON:

/s/ D. Barry Sutton (SEAL)
D. BARRY SUTTON

Date of Sutton's Execution:

1/15/97

Approved by Counsel
for Sutton:

BONDURANT, MIXSON &
ELMORE, LLP

By: /s/ Jill A. Pryor, Esq.
Jill A. Pryor, Esq.

Initial address for notices:
Bondurant, Mixson & Elmore
3900 One Atlantic Center
1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3417
Attention: Jill A. Pryor, Esq.
Telephone No.: (404) 881-4100
Telecopy No.: (404) 881-4111

ESCROW AGENT

Escrow Agent acknowledges receipt of the Escrow Fund and agrees to hold and disburse the Escrow Fund in accordance with the terms and conditions of this Agreement.

KEARNS & ASSOCIATES, P.C.
By: /s/ Raymond J. Kearns
(SEAL)
RAYMOND J. KEARNS,
PRESIDENT

Date of Escrow Agent's Execution:

1/15/97

Kearns & Associates, P.C.
5775-B Glenridge Drive
Suite 210
Atlanta, GA 30328
Telephone No.: (404) 256-2017
Telecopy No.: (404) 256-3252

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **VERIFIED AMENDED COMPLAINT** by mailing by United States mail a copy thereof to counsel of record in an envelope properly stamped and addressed as follows:

Keith W. Kochler, Esq.
Paul T. Stagliano, Esq.
BellSouth Telecommunications, Inc.
Legal Department
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375

This 15th day of January, 1997.

/s/ Jill Pryor
Jill A. Pryer